LITIGATION MEMO

To: Legal Staff
From: Meredith Bohen, Work and Family Program
Date: June 1, 2023
Re: Katie Oliver

I. INTRODUCTION

The Work and Family Program seeks approval to file a case alleging illegal sex discrimination stemming from impermissible gender stereotypes related to caregiving. Katie Oliver is a woman who was employed as an executive suites manager at Pleasant View Properties, a real estate and property management company. Ms. Oliver began leave from her job at Pleasant View to have her child in November 2021. Just before she was set to return, she requested an extension of her leave to gain additional time to find full-time childcare. When the extension request was denied, Ms. Oliver responded that she would return in April as originally planned and that she would arrange for her new child to be watched by family. Instead, her supervisor terminated her employment, citing the company's belief that her childcare needs would be a continuing issue moving forward.

Bringing this suit on Ms. Oliver's behalf could strengthen case law for caregivers, drawing the connection between discrimination against workers with family care responsibilities and assumptions based on gender.

II. BACKGROUND & FACTS

Katie Oliver was hired as an executive suites manager at Pleasant View Properties on August 16, 2021. In November 2021, she began leave to have her first child. Because she had worked there for about three months before taking leave, she was not eligible for job-protected leave under the Family and Medical Leave Act (FMLA) or California Family Rights Act (CFRA). Her employer appears to have assumed that she was eligible for CFRA bonding leave and approved this leave. She and Pleasant View came to the agreement she would return from leave on April 11, 2022.

In late March, in anticipation of the April 11th date, Ms. Oliver wrote to Pleasant View requesting that she be allowed to postpone her return date until May. She explained that she had faced difficulty finding childcare for her newborn, but that she had found a caregiver who would start watching her child part-time in May and full-time in August. She proposed to return to work full-time when childcare began in May.

Ms. Oliver spoke to Ms. Lisa Rodgers, Human Resources Manager, and Mr. Jim Shephard, Property Manager, over the phone on April 1. In that conversation, Ms. Rodgers and Mr. Shephard informed Ms. Oliver they were not granting her request for an extension of her leave. Accepting this, Ms. Oliver replied that in that case, she would return on April 11 and

would make alternative arrangements for family members to watch her child until the caregiver she had found was able to start.

Ms. Rodgers responded that instead, they would be "going in a different direction" because they "fore[saw] [Ms. Oliver's] childcare situation would become a disruption." Ms. Oliver asked if that meant that she could not return, even on the originally agreed-upon date, and was told that the company was terminating her. Ms. Oliver started to cry and reiterated that she was able and willing to return to her job on the originally planned date and that her family relied on her income. Despite Ms. Oliver's pleading to keep her job and assurance that family members could take care of her child until her caregiver was available to start, Pleasant View refused to reconsider and terminated Ms. Oliver's employment, effective April 1.

Under these facts, Ms. Rodgers' and Mr. Shephard's conclusion that Ms. Oliver could not return to work because she had caregiving responsibilities could not have been based upon Ms. Oliver's own words and must have been based upon assumptions about her responsibilities as a mother. The remark that they "foresaw" this becoming a reoccurring issue was not based on Ms. Oliver's account of her situation and demonstrates that other assumptions about Ms. Oliver's caregiving responsibilities were brought into the calculus. Significantly, the assumption remained despite Ms. Oliver's ready agreement to return to work on the originally agreed-upon date. It also remained over her unambiguous reassurance that family members could step in to care for her child. Pleasant View refused to allow Ms. Oliver to return and therefore could not have made the decision to fire her based on *any* facts about her actual performance or availability. Thus, Ms. Oliver's superiors expressed a presumption that her caregiving responsibilities would override her ability to work in the future, despite no evidence of this.

On July 12, 2022, the Work and Family Team sent a demand letter to Pleasant View Properties, alleging violations of Title VII of the Civil Rights Act and California's Fair Employment and Housing Act (FEHA), as well as wrongful termination in violation of public policy. The letter further stated that Ms. Oliver was considering her legal options but suggested an openness to an informal resolution to her legal claims. Through its attorneys, Pleasant View denied wrongdoing. It expressed cautious openness to a "modest, reasonable demand" to avoid the costs of litigation. Pleasant View's letter did not address the central claim that it had made assumptions about Ms. Oliver's ability to work based on her status as a woman and mother.

On October 13, 2022, Ms. Oliver filed a charge with the U.S. Equal Employment Opportunity Commission and cross-filed with the California Civil Rights Department alleging that Pleasant View's actions constituted unlawful sex discrimination under Title VII and FEHA. The EEOC is currently investigating the charge.

III. LEGAL ANALYSIS OF POTENTIAL CLAIMS

A. Pleasant View Properties Violated Title VII and FEHA by Firing Katie Oliver Based on Assumptions about Her as a Mother.

Under both Title VII of the Civil Rights Act and FEHA, it is unlawful for an employer to discharge any individual because of their sex. 42 U.S.C. § 2000e–2; Cal. Gov't Code § 12940(a). While mothers or caregivers are not protected classes under federal or state law, Pleasant View's

conduct is unlawful if it is related to Ms. Oliver's sex. Specifically, under both Title VII and FEHA, employers may not terminate an employee because of assumptions based on gender stereotypes.

1. Pleasant View Discriminated Against Ms. Oliver in Violation of Title VII.

Under Title VII, discrimination based on a female worker's caregiving responsibilities is unlawful when it is linked to gender stereotypes about female caregiving. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 229 (1989) (sex discrimination includes assumptions based on stereotypes). The EEOC has published guidance specifically addressing caregiver discrimination in the context of the COVID-19 pandemic, when it had become particularly salient, stating in relevant part:

> "it would violate the law if an employer refused to hire a female applicant or refused to promote a female employee **based on assumptions that, because she was female, she would (or should) focus primarily on caring for her young children** while they attend school remotely […] Employers also may not penalize female employees more harshly than similarly situated male employees for absences or missed deadlines due to pandemic-related caregiving duties."

Equal Employment Opportunity Commission, EEOC-NVTA- 2022-1, *The COVID-19 Pandemic and Caregiver Discrimination under Federal Employment Discrimination Laws* (Mar. 14, 2022), *available at* https://www.eeoc.gov/laws/guidance/covid-19-pandemic-and-caregiver-discrimination-under-federal-employment (emphasis added). Though the guidance was issued in relation to the pandemic, it is intended to reiterate the applicability of prior policy. This guidance supplements portions of the guidance issued in the Bush administration, still in effect, that found that "Title VII does not permit employers to treat female workers less favorably merely on the gender-based assumption that… a female worker's caretaking responsibilities will interfere with her work performance." Equal Employment Opportunity Commission, EEOC-CVG-2007-1, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (May 23, 2007), https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities#gender. It is thus unlawful when an employer fires a female employee based on assumptions that because she was female, she would focus primarily on caring for her young children rather than her work responsibilities.

Title VII also prohibits employers from discriminating against working mothers, even when they do not discriminate against childless women. In *Phillips v. Martin Marietta Corp.*, the Court found that an employer who had a policy of not hiring women with young children violated Title VII because it did not have a policy of not hiring men with young children. 400 U.S. 542, 544–45 (1971).

To establish a prima facie disparate treatment case, the plaintiff must show (1) that the employee is a member of a protected class, (2) that the employee was qualified and/or performing the job satisfactorily, (3) that the employee suffered an adverse employment action, and (4) that the employee's protected class was a substantial motivating reason for the adverse employment action. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The

prima facie standard is identical under FEHA. *See Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317, 355 (2000) (California adopts *McDonnell Douglas* framework for claims of discrimination).

Ms. Oliver can establish a prima facie case. First, she is a member of a protected class due to her sex. Second, she performed her job satisfactorily and should have been permitted to continue to do so following the end of her leave. Ms. Oliver had no record of disciplinary action while working at the company and there is no indication she was not performing her job well. Third, she was terminated, an adverse employment action. Finally, sex-based stereotypes were the substantial motivating reason for adverse employment. Ms. Rodgers provided direct evidence of sex-based stereotyping as a substantial motivating reason for Ms. Oliver's termination when she stated that Pleasant View was terminating her because they foresaw her caregiving responsibilities being an issue in the future, an assumption based on Ms. Oliver's status as a woman.

If the plaintiff succeeds in establishing a prima facie case, the burden then shifts to the defendant to provide a legitimate, nondiscriminatory reason for its conduct. *See Bechtel*, 24 Cal. 4th at 356. If the defendant provides this reason, the burden shifts back onto the plaintiff to show that the employer's reason is a pretext for discrimination. *Id.* Pretextual evidence may include evidence that the employer treats similarly situated employees who are not a member of the protected class differently, evidence about the employer's treatment of the employee during their employment, or evidence about the employer's general policy and practice concerning employment of members of the protected class. *McDonnell Douglas*, 411 U.S. at 804-05. For potential difficulties arising at this stage, see *infra* Part III.C, Difficulties and Likely Defenses.

Importantly, Ms. Oliver does not need to produce direct evidence that sex was a motivating factor in the employment decision. It is enough to infer discrimination from circumstantial evidence by applying the *McDonnell Douglas* test. 411 U.S. at 804. The Supreme Court has noted that sex-based stereotypes about the allocation of family duties are "firmly rooted" in American culture and that there remains a "pervasive sex-role stereotype that caring for family members is women's work." *Nevada Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 730-31 (2003) (discussing the policy motivations for enacting FMLA). Thus, the inference that sex-based stereotypes underlies caregiving discrimination is particularly strong. *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 44-46 (1st Cir. 2009) (discussing the pervasive stereotype and finding that lack of direct evidence of sex stereotyping is not a sufficient basis for summary judgment for the defendant when circumstantial evidence existed).

2. Pleasant View Discriminated Against Ms. Oliver in Violation of FEHA.

Under the FEHA, similarly, a company's practice of sex stereotyping is unlawful when it is the basis for an adverse employment decision. *See Harris v. City of Santa Monica*, 56 Cal.4th 203, 229 (2013). However, that case did not concern caregiving (the plaintiff was fired for being pregnant and had not yet had her baby at the time of the termination).

Stating a claim under FEHA is the same as it is under Title VII, *see supra* Part 3.A.I. *See also Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317, 355 (2000).

B. PLEASANT VIEW PROPERTIES WRONGFULLY TERMINATED MS. OLIVER IN VIOLATION OF CALIFORNIA PUBLIC POLICY.

A termination is illegal when it violates California public policy. See *Tameny v. Atlantic Richfield Co.*, 27 Cal.3d 167, 172 (1980) (affirming that employers may not terminate employees in violation of a firmly established principle of public policy and collecting cases). To support a wrongful termination claim, this public policy must be rooted in the Constitution or a statute. This violation of public policy gives rise to a common law tort claim for wrongful discharge. *Tameny,* 27 Cal.3d at 172-74, 176.

Pleasant View Properties violated California's fundamental public policy against sex-based discrimination when it terminated Ms. Oliver based on her status as a woman or mother. California's Constitution prohibits employment discrimination based on sex, Calif. Const. art. 1, § 8, as does California code, Cal. Gov't Code § 12940(a). Thus, she can properly state a claim for wrongful discharge in violation of public policy.

C. DIFFICULTIES AND LIKELY DEFENSES

While Ms. Oliver's case has relatively clean facts with few other dynamics at play outside of her status as a mother and her caregiving responsibilities, it is not without challenges. Key difficulties include: a defense that Pleasant View did not terminate Ms. Oliver due to sex stereotypes, a defense that they did so due to "mixed motives," or a defense that this case is subject to the powerful "same actor inference."

1. Potential Defense: Pleasant View Did Not Terminate Ms. Oliver Due to Sex Stereotypes.

Pleasant View may argue that their termination of Ms. Oliver based on her caregiving responsibilities was not unlawful, as they argued in their reply to the Work and Family Program's demand letter. Their argument primarily rests on the assertion that caregiver discrimination is not unlawful and that caregiving is a gender-neutral trait. *See* Pleasant View Reply to Demand Letter 3 (citing cases from out-of-state district courts concluding that childcare does not fall under Title VII or the Pregnancy Disability Act). It also rests on the disputed assertion that Ms. Oliver could not work because she could not find childcare. *Id.* This ignores Ms. Oliver's willingness to come back to work on her assigned date and leave her child in her family members' care. To fully respond to Ms. Oliver's prima facia case for sex discrimination, Pleasant View must grapple with our argument that caregiver discrimination is unlawful when it is based on sex stereotypes and that this was the case here.

The case would become more difficult if Pleasant View could establish that Ms. Oliver was fired due to her caregiving responsibilities, but in a way that was not directly related to her sex. For example, one can imagine a case with a parent who has repeatedly taken unscheduled time off work for childcare in the past and makes comments suggesting this behavior will continue. In that case, a lawful termination could be based on caregiving, not due to gender stereotypes, but due to past evidence establishing a likelihood of absenteeism. Pleasant View cites several cases that might establish the proposition that caregiving is gender neutral and thus termination on that basis is not unlawful (though those cases largely analyze what type of

discrimination is contemplated by the Pregnancy Disability Act and are not squarely on point). In particular, it will be useful to characterize Ms. Oliver's superiors' comments that they "fore[saw]… disruptions" as an expression of gender stereotyping rather than a reflection of gender-neutral behavior.

Notably, Pleasant View's lawyers did *not* argue in the reply to our demand letter that Pleasant View did not fire her because of her caregiving responsibilities but instead did so for another reason. *See* Reply to Demand Letter 3 ("There was nothing discriminatory or otherwise unlawful in Pleasant View's decision to terminate Ms. Oliver's employment because she could not return to work.") Though it would have been cleaner to argue Pleasant View had fired her due to other concerns about her work, or for no reason at all, they did not do so, thus conceding the reason why they fired her and merely disputing that it is unlawful.

2. Potential Defense: Pleasant View Had "Mixed Motives" in Terminating Ms. Oliver.

As discussed in Part III.A.1, *supra*, after the plaintiff establishes a prima facie case and the defendant provides a non-discriminatory explanation for the termination, the burden shifts back to the plaintiff to show the employer's reason is a pretext for discrimination. Difficulties under federal and state law may arise if Pleasant View argues that it acted out of several motivating factors, one of which is gender discrimination.

Under the Civil Rights Restoration Act of 1991, if an employee can prove that their gender was a "motivating factor" in any employment practice, that is sufficient to establish a violation of Title VII. *City of Santa Monica*, 56 Cal. 4th at 219. However, if the employer can prove that it would have made the same decision in the absence of the "impermissible motivating factor," it can avoid paying damages or reinstating the employee. *Id. See also* 42 U.S.C. § 2000e–5(g)(2)(B) (when the employer "demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court […] shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment").

Under FEHA, an employee must produce evidence sufficient to prove that their gender was a "substantial motivating factor" to prove a violation. *City of Santa Monica*, 56 Cal. 4th at 219. This is a higher bar than "motivating factor," and lies between "mere thoughts or passing statements" and but-for causation. *Id.* However, under California law, the employer cannot avoid paying damages or reinstating the employee by proving that they would have made the decision even in the absence of the impermissible motivating factor.

Thus, under federal law, for Ms. Oliver to secure relief, her employer must not prove that it would have made the same decision without sex stereotyping. Under California law, Ms. Oliver must show that gender discrimination was not just a factor but a substantial motivating factor to prevail.

3. Potential Defense: Inference Against Discrimination When Terminated Shortly After Hired by the Same Individuals.

As noted in Part III.A.1, *supra*, the inference that sex stereotypes underpin caregiver discrimination is particularly strong because of its roots in American culture. However, Pleasant View argues there is a strong inference *against* discrimination in this case because Ms. Oliver was terminated by the same individuals who had recently hired her under the "same actor inference." Observed by California courts, this doctrine suggests that there is a strong inference of no discriminatory motive "when the same actors are involved in hiring and firing a plaintiff who claims discrimination over a short period of time." Reply to Demand Letter 1. *See Schechner v. KPIX-TV*, 686 F.3d 1018, 1026 (9th Cir. 2012); *Bradley v. Harcourt*, *Brace & Co.*, 104 F.3d 267, 270–71 (9th Cir. 1996). This "strong inference" must be considered on a motion for summary judgment. *Schechner*, 686 F.3d at 1026. Pleasant View therefore argues that because Ms. Oliver was hired five months before termination and was visibly pregnant at the time, it is "hard to imagine" that she was fired for a discriminatory reason. Reply to Demand Letter 1.

This strong inference is by no means dispositive of Ms. Oliver's case, but it presents a complication to what otherwise might be a strong inference in her favor based on the pervasive cultural stereotype around caregiving. It may even serve to negate the presumption in her favor entirely. In *Bradley*, the Ninth Circuit found that because the plaintiff did not offer any evidence of discriminatory motive, she could not rebut the same actor presumption in favor of the person who had hired her, and the defendant was entitled to summary judgment on sex discrimination claims. 104 F.3d at 271.

At the same time, the same actor inference is also not as straightforwardly applied in this case as in the cases cited by Pleasant View. Though Ms. Oliver was always a member of the protected class, she was not a caregiver – the basis of the gender stereotype here – at the time of her hiring. Though it is reasonably likely a pregnant person will become a caregiver, it is plausible that such gender stereotypes may not surface before they became more directly germane.

IV. MISSION-RELATED IMPACT

Caregivers including parents are not a protected class under federal or state law. The Work and Family team has been involved in advocacy aimed at expanding protections for caregivers. For example, California Assembly Bill 524, or the Family Caregiver Anti-Discrimination Act, would prohibit discrimination of this kind by making it unlawful for employers to refuse to hire, fire, demote, or take other adverse employment action against employees based on their status as a family caregiver.

Until a law of this kind is passed federally or statewide, it remains the case that caregivers who experience discrimination at work must state their claim in terms of discrimination based on sex, and in particular sex stereotypes, which drives a significant amount of discrimination against mothers. Cultural stereotypes that women are the primary caregivers, prefer to take care of children than to work, or *should* prefer to take care of children than work all drive assumptions about employees who are mothers. By issuing specific guidance on this issue at the height of the pandemic when the interaction between work and caregiving responsibilities was more relevant than ever, EEOC made clear their policy is that caregiver discrimination is often based on gender stereotypes and is unlawful when so based.

Without laws expressly protecting caregivers, California case law standing for the proposition that caregiver discrimination is unlawful when based on sex stereotypes would strengthen the protections provided to California workers with family responsibilities, including new children. A positive outcome in this lawsuit would have immediate significance for mothers and female caregivers across the state. Ms. Oliver's case is particularly well-suited to this task as it has relatively few other dynamics at play beyond her status as a mother and her caregiving responsibilities, setting up a clean analysis of the caregiving discrimination issue.

9

Applicant Details

First Name	**Jamie**
Last Name	**Brensilber**
Citizenship Status	**U. S. Citizen**
Email Address	**jlb2323@columbia.edu**
Address	**Address** **Street** **345 East 94th St., Apt. 29C** **City** **New York** **State/Territory** **New York** **Zip** **10128** **Country** **United States**
Contact Phone Number	**5167125533**

Applicant Education

BA/BS From	**University of Pennsylvania**
Date of BA/BS	**May 2017**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 20, 2020**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Columbia Journal of European Law**
Moot Court Experience	**Yes**
Moot Court Name(s)	**European Law Moot Court**

Bar Admission

Admission(s)	**New York**

Prior Judicial Experience

Judicial Internships/Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Harbeck, Dorothy
daharbeck@aol.com
Wilson, Scott
scott.wilson@us.dlapiper.com
Bradford, Anu
abradf@law.columbia.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Jamie Brensilber
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345 East 94th Street, Apt 29C
New York, NY 10128

June 07, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am a litigation associate at DLA Piper (US) LLP and a 2020 graduate of Columbia Law School. I write to apply for a clerkship in your chambers beginning in the 2024 term or any term thereafter.

Strong research and writing skills, dedication, and diligence are strengths I would bring to this position. During my time at DLA Piper, I was entrusted with writing motions and an appellate brief in an art law case, various motions and replies in insurance cases, and a summary judgment brief in a financial services case, among others. I have researched unique questions of law in jurisdictions across the country and internationally, while advising multinational companies and small organizations alike. These experiences have honed my strong research and writing skills and taught me how to address different clients' needs.

Enclosed please find a resume, transcript, and writing sample. Also enclosed are letters of recommendation from Professor Anu Bradford (212-854-9242, abradf@columbia.edu); Scott Wilson, a partner at DLA Piper (212-335-4915, scott.wilson@us.dlapiper.com), and Judge Dorothy Harbeck (daharbeck@aol.com).

Thank you for your consideration. Should you need any additional information, please do not hesitate to contact me.

Respectfully, Jamie Brensilber

JAMIE BRENSILBER
345 East 94th St., Apt. 29C, New York, NY 10128 | (516) 712-5533 | jlb2323@columbia.edu

EDUCATION

Columbia Law School, New York, NY
J.D., Certificate in Global Business Law and Governance, received May 2020
Honors: James Kent Scholar (2019-2020), Harlan Fiske Stone Scholar (2018-2019)
Activities: *Columbia Journal of European Law*, Articles Editor
European Law Moot Court, Coach
Legal Aid Society Immigration Law Unit, Externship
Queens District Attorney's Office Domestic Violence Bureau, Externship
CSIL, Speaker Series Committee Chair
Jewish Law Students Association, Treasurer

University of Pennsylvania, Philadelphia, PA
B.A., *summa cum laude*, received May 2017
Majors: Political Science & French and Francophone Studies
Honors: Phi Beta Kappa, Pi Sigma Alpha, Pi Delta Phi, John Marshall Pre-Law Honor Society
Theses: "Mobilization in the Paris Commune of 1871" (Political Science)
« Les représentations de la Commune de Paris » (French)
Awards: Leo S. Rowe Prize (for best thesis in comparative or international politics)
Best Honors Thesis in French & Francophone Studies
Activities: Penn Band
Penn Speaks for Autism, Vice President
Francophone Community Partnership, Founding Member
Study Abroad: Columbia-Penn Program in Paris at Reid Hall, Paris, France (Fall 2015)

EXPERIENCE

DLA Piper, LLP, New York, NY Summer 2019, 2021-present
Defended clients in complex commercial litigations, commercial arbitrations, and art litigations in multiple jurisdictions. Researched and drafted motions to dismiss, motions for summary judgment, and appellate brief. Assisted multinational corporations with global investigations conducted by the D.O.J. and S.E.C. Represented asylum applicants before U.S.C.I.S.

New York State Office of the Attorney General, Mineola, NY Summer 2018
Conducted legal research for and drafted written answers to petitions for Article 78 actions and motions to dismiss. Drafted affidavits and memoranda. Assisted attorneys in preparation for conferences.

Proskauer Rose LLP, New York, NY
Summer Paralegal Summer 2016
Conducted research for SIJS pro bono cases, organized trial materials for IP case, sorted through attorney work product for high-profile entertainment case, prepared and reviewed binders for court.

Nassau County District Attorney, Mineola, NY
Intern, District Court Summer 2014
Organized court documents, prepared statistics reports and graphs on Excel, maintained calendar in court for Adolescent Diversion Program, researched cases, and prepared voluntary discovery.

LANGUAGE SKILLS: French (fluent)
INTERESTS: French language and culture, music performance, historical fiction

June 07, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Recommendation for Jamie Lauren Brensilber—Judicial Clerkships

Dear Judge Matsumoto:

I am writing to wholeheartedly recommend Jamie Lauren Brensilber, who was a student of mine at Columbia Law School (CLS) in 2018, for a clerkship with your court. She was a student in my immigration trial skills class in the 2018 fall semester. This class uses U.S. asylum cases as hypotheticals for students to develop and refine trial skills. The course curriculum requires students to work together in a workshop environment and to critique each other. It has a writing component as well. Ms. Brensilber rapidly became well versed in immigration law, through both my class and her research. I understand that this course sparked her interest in asylum cases which in turn inspired her to pursue an externship the following semester at the Legal Aid Society's Immigration Law Unit. Before graduating from CLS, when she was a summer associate at DLA Piper, she worked on pro bono immigration matters and did substantial research on domestic violence in West African countries, which is a very current issue in international migration. Further, as a full-time associate at DLA Piper, she has donated her skill and time as an attorney on affirmative asylum cases before USCIS. These were for Francophone West Africans and Ms. Brensilber is fluent in French.

She is currently at DLA Piper in their litigation practice in New York. I understand she has worked on complex commercial litigations, represented a museum in a few art cases, assisted with insurance litigations, and helped defend pharmaceutical and medical device companies in government-facing investigations.

She has also served as a mentor to summer associates, helped with recruiting, and planned several events for the women lawyers' group. This energetic approach to her practice is a further step in what I observed in her as a student at CLS-- I am aware that while carrying a full course load at CLS, she also completed an Immigration Law Externship at the Legal Aid Society. Further, she was also both a competitor and coach in the European Law Moot Court Competition. In her last semester of law school, she studied abroad with the Global Alliance Program in Paris. She can balance many projects at one time; she certainly has a superb grasp of the complex and developing issues in the field and she has an easy going and unflappable demeanor.

She managed a complex and rigorous academic schedule in the CLS program; yet she was always prepared in class and always willing to volunteer for extra work. She truly is grace under pressure. She exhibits superlative work ethic. She works hard and works well. Her work as an undergraduate at University of Pennsylvania is equally as impressive and her choice of a double thesis (one written in English and the other written in French) on the Paris Commune of 1871 demonstrates her desire to dig into thorny historical events and dismantle them. I was very impressed in our trial skills class when I called upon Ms. Brensilber to get up and give a five-minute speech extemporaneously with no warning or preparation and she spoke extremely well and engagingly on socialism in the France in the 1870s.

In my interactions with Ms. Brensilber, I have observed that she can always be relied upon to analyze legal issues with skill and to analyze factual issues with a rare combination of critical analysis and humane compassion. It is because of her enthusiasm for law, her professional courtroom demeanor, her accomplished researching and writing ability, as well as her easy-going personality that I support her application to become a judicial law clerk. She is dedicated, eager, hard-working, and a strong writer. In her assignments in my class, Ms. Brensilber demonstrated the ability to write clearly and concisely. In her time at DLA, she has developed strong legal research skills and have grown even more confident in legal writing.

I cannot endorse Ms. Brensilber enough. She has the temperament, the knowledge, the demeanor and the energy to be an excellent law clerk. Although I write this recommendation in my capacity as her former professor, as U.S. immigration judge myself, I am very impressed with her skills, her attitude, and her ability to work on a team.

Very truly yours,

Hon. Dorothy A. Harbeck
dh2940@columbia.edu

June 07, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write in support of the clerkship application of my colleague Jamie Brensilber, who is a litigation associate at my law firm, DLA Piper LLP (US). I am a litigation partner in the firm and previously was a partner at Boies Schiller Flexner LLP. Earlier in my career, I served in government as Senior Advisor and Special Counsel to the New York Attorney General.

I have worked closely with Jamie and supervised her work directly on a range of cases since she joined the firm in 2021. She is exceptionally bright, and a talented and diligent researcher with an analytical and curious mind. Her writing is clear, cogent and well organized—more so than most of her peers. Even as a first-year associate, I had her take the lead in briefing a successful motion to dismiss conversion and declaratory judgment claims filed in New York State Supreme Court against a museum client concerning an allegedly stolen 18th century work in the museum's permanent collection. She conducted all of the legal research, and the trial court adopted her arguments almost verbatim in its decision. Jamie also led the briefing on the appeal, where we were again successful.

Jamie is a self-starter whose intellectual curiosity and perennial enthusiasm for complex legal issues and assignments makes it a pleasure to collaborate with her. She is also very pleasant to work alongside, and well regarded by everyone who works with her. She is the type of person and lawyer who treats everyone from the senior partner to administrative staff with the same collegiality, respect and courtesy, which is an additional reason why I believe she would be very successful as a clerk.

Not surprisingly, Jamie has all the conventional academic honors. She graduated summa from the University of Pennsylvania, and was a James Kent Scholar and Harlan Fiske Stone Scholar at our alma mater, Columbia Law School. She also has a working knowledge of French, which led us to collaborate on the pro bono representation of a French-speaking asylum seeker from Burkina Faso who is a survivor of female genital mutilation.

It has been several years since I have recommended an associate for a clerkship, which reflects the very high regard in which I hold Jamie. I have no doubt that Jamie will have a very successful career as a litigator and would make a first-rate addition to your chambers. She has my strongest recommendation.

If I may provide any additional information in support of Jamie’s application, please do not hesitate to contact me at (212) 335-4915 or scott.wilson@us.dlapiper.com.

Respectfully submitted,

/s/

Scott R. Wilson
Partner
DLA Piper LLP (US)

June 07, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am writing to you in support of Jamie Brensilber and her application for a clerkship with you.

I know Jamie in my capacity as a Professor at Columbia Law School. I taught Jamie European Union Law in the fall of 2018. I also supervised her note focusing on the intersection between EU counterterrorism and privacy policies. In those contexts, I got to know her analytical capabilities as well as over-all academic potential well. I therefore feel confident and delighted in writing on her behalf.

Jamie is a bright, highly motivated, and intellectually curious individual. She was among the strongest students in my European Union class, earning a grade of A-. Jamie's class participation similarly showed that she understands even the most complicated legal issues, and she is always immaculately well prepared to address them. She was consistently one of the most reliable students that I called on when I needed to move the conversation forward and make sure that the class benefits from a nuanced legal analysis. Her note similarly earned her an A-, demonstrating that she is a skillful researcher and effective writer. She has the eye for important topics and the ability to connect those topics to broader legal debates and scholarly frameworks.

In addition to her academic abilities and notable work ethic, I would also like to highlight Jamie's professional demeanor and social grace. In the classroom setting, Jamie was capable of defending her arguments, yet always respectful of the views of her fellow students.

I am confident that Jamie's intellectual excellence, resourcefulness, analytical sophistication and dedication to strive will make her an excellent law clerk. I therefore strongly support her application and remain available to answer any questions you might have.

Sincerely,

Anu Bradford

Anu Bradford - abradf@law.columbia.edu

June 1, 2023

To whom it may concern:

This brief was submitted in an affirmative asylum application before the Newark Asylum Office. As of the date of writing, the case remains pending before the asylum office. In the interest of protecting the client's privacy, I have redacted all names and identifying information. The brief has not been substantially edited by anyone other than myself.

Thank you.

Jamie Brensilber

UNITED STATES DEPARTMENT OF HOMELAND SECURITY
UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICE
NEWARK ASYLUM OFFICE

In The Matter of:	
Application for Asylum, of [redacted]	File No: A# [redacted]

BRIEF IN SUPPORT OF APPLICATION FOR ASYLUM, WITHOLDING OF REMOVAL, AND RELIEF UNDER THE CONVENTION AGAINST TORTURE

Ms. [redacted] ("[redacted]"), by and through undersigned *pro bono* counsel, respectfully submits this brief in support of her Application for Asylum, Withholding of Removal, and Relief under the Convention Against Torture.

[redacted]'s application demonstrates she qualifies for asylum under Sections 101(a)(42)(A) and 208 of the Immigration and Nationality Act ("INA"). She is outside her country of origin and is unwilling or unable to return to it. [redacted] is a citizen of Burkina Faso and fled to the United States in 2016 because she experienced persecution in the form of female genital mutilation ("FGM") and domestic violence due to her inability to have children after being excised. She has a genuine and well-founded fear based on her experience that the persecution she suffered at the hands of her in-laws and her husband would continue and escalate if she were forced to return to Burkina Faso. Her husband's family has persecuted her in the past – and likely would persecute her in the future – on account of her membership in a particular social group (Burkinabe women who were excised and cannot have children), on account of her political opinion (opposition to FGM), and on account of her conversion to Christianity. She is unable to avail herself of the protection of Burkina Faso because the government and police have proven unable to protect their citizens from FGM and domestic violence.

Although [redacted] initially filed her asylum application a few days outside of the one-year bar, she should be granted an exception for extraordinary circumstances. Directly prior to the filing of her application, [redacted] was very ill with severe anemia, uterine fibroids, and painful menstrual cycles. *See* Affidavit of [redacted] ([redacted] Aff.) ¶¶ 28-30, 65, Ex. B; *see also* Medical Records, Ex. K, pp. 1, 5; *see also* Declaration of Dr. [redacted] ([redacted] Dec.), ¶ 10, Ex. M. She suffered excessive bleeding, fainted, and had to be brought to the hospital. *See* [redacted] Aff. ¶ 29-30, Ex. B; *see also* Medical Records, Ex. K, pp. 4-5. [redacted] had been ill for some time and unable to submit her application earlier. Still, [redacted] mailed her application before the deadline, but the United States Citizenship and Immigration Services

("USCIS") only received it three days after the one-year bar, which should be considered reasonable under the circumstances.

[redacted] has attached an affidavit ([redacted] Aff. Ex. B), country conditions documents (Ex. O-BB), and supporting declarations in support of her application for relief (Ex. F-H, M-N).

I. STATEMENT OF FACTS

A. [redacted] is a victim of female genital mutilation, a traumatizing experience.

In or about 1990, [redacted] experienced the trauma of FGM at about ten years old. *See* [redacted] Dec. ¶ 13, Ex. M. [redacted]'s mother brought her on vacation to the village of Boromo, where she had previously vacationed. *See* [redacted] Aff. ¶ 20, Ex. B. [redacted] was not afraid, as she had spent time in the village before and was able to play with her cousins and friends. *Id*.

One day, [redacted] was playing outside with her cousins and friends, when some older women started calling the girls inside one by one. *See* [redacted] Aff. ¶ 21, Ex. B. She did not know why they were being called inside, but when it was her turn, [redacted] had a bad feeling. Women in her family had never told her about female genital mutilation, as it was a taboo subject. [redacted] tried to run away, but the women caught her and forced her inside. *Id*. They thrust her on a mat on the ground and held her down. [redacted] saw the knife and the expression on the mutilator's face, and her fear heightened. [redacted] thought the women were going to kill her. *Id.* She fought back against the women restraining her, telling them they were hurting her. The women laughed, saying what would happen next would be even more painful. *See* [redacted] Aff. ¶ 22, Ex. B. When the knife touched her skin and the excision began, [redacted] could not believe the excruciating pain. [redacted] was cut without anesthesia, a painful and terrifying experience. She screamed, but at one point, she could not scream anymore. Since she continued to fight and squirm, the knife slipped and cut more than was intended. After they were done, the women cleaned her up and placed a piece of cloth over her skin. *See* [redacted] Aff. at ¶ 24, Ex. B.

The women took her to a room where her cousins and friends were sitting quietly because the women threatened them if they cried. *See* [redacted] Aff. ¶ 24, Ex. B. [redacted] continued to bleed more than the other girls, so the women had to take her to a nearby free clinic. At the clinic, the doctors put alcohol on her wound, which burned but stopped the bleeding. *See* [redacted] Aff. ¶ 25, Ex. B.

When [redacted] returned to her mother, she would not speak to her mother, whom she considered complicit in her excision. However, she would later learn that her mother had suffered to protect [redacted] younger sister and had little choice in the matter. *See* [redacted] Aff. ¶ 26, Ex. B. [redacted] is a member of the Wala tribal group, which practices excision. *See* [redacted] Aff. ¶ 11, Ex. B. Thirty years after her excision, [redacted] is still traumatized by the experience and will never be able to forget the terror she felt at the time.

For years afterward, [redacted] would experience side effects of her excision. When she married, she was terrified of intercourse and then eventually experienced no enjoyment from it. *See* [redacted] Aff. ¶ 32, Ex. B. After ten years of marriage, she was unable to have children, for which her ex-husband blamed her. *See* [redacted] Aff. ¶ 33, Ex. B. Her ex-husband even threatened to have her excised again, suggesting her infertility may have been caused by an incomplete excision. *See* [redacted] Aff. ¶ 35, Ex. B. The experience of being a victim of FGM traumatized and permanently scarred [redacted], physically and emotionally. It destroyed her marriage and her perceived value in Burkinabe society, along with her ability to have children.

B. [redacted] has suffered physical and verbal abuse by her husband and his family.

[redacted]'s husband and in-laws have subjected her to both physical and verbal violence on account of her inability to have children. In 2006, [redacted] married [redacted], a man about fifteen years her senior who did not treat her kindly. *See* [redacted] Aff. ¶ 15, Ex. B. As a result of her excision, [redacted] was hesitant to be intimate with her husband. Over the course of ten years of marriage, [redacted] was never able to have a child. *Id.* Her husband and his family blamed her for this fault, as in Burkina Faso, women are expected to have children to have value in society. See [redacted] Aff. ¶¶ 15, 33, Ex. B.

In addition, [redacted] brother-in-law struck her for her alleged failings and tried to get her to leave. See [redacted] Aff. ¶ 44, Ex. B. On several occasions, [redacted] mother-in-law called her worthless for not producing a child and said she served no purpose. She even threw water on [redacted]. See [redacted] Aff. ¶ 45, Ex. B. While [redacted] husband was aware of this abuse, he did not act to protect her, saying he believed it was normal to hurt your women for their failings. See [redacted] Aff. ¶ 44, Ex. B. He also gave his brother permission to kill her. See [redacted] Aff. ¶ 44, Ex. B. Similarly, [redacted] sisters-in-law repeatedly mocked her, saying she was not worthy of their family and should leave. When [redacted] tried to return to her family's house, her own mother turned her away, saying she belonged to another family now that she was married. See [redacted] Aff. ¶ 45, Ex. B. [redacted] had nowhere to turn, and after her mother-in-law literally chased her out of the house a few times, she resorted to sleeping under a tree outside. See [redacted] Aff. ¶ 43, 45, Ex. B.

[redacted] in-laws also deprived her of food in punishment for her failure to produce a child. She had to buy food outside of the house with the money she earned working as a tailor. See [redacted] Aff. ¶ 46, Ex. B. On a few occasions, it seemed to [redacted] that her husband was about to hit her, so she would run outside to escape. Having nowhere to turn and no life as a woman with no children, [redacted] prayed for a way out and a way to safety. See [redacted] Aff. ¶ 48, Ex. B.

In or about 2008, [redacted] tried to kill herself by swallowing pills. See [redacted] Aff. ¶ 49, Ex. B. She went to the courtyard to get some water for the pills, but she fell and broke the glass she carried. A kind neighbor heard the glass break and came by to see if she were okay. *Id.* [redacted] took the kind neighbor and the glass breaking as a sign that she was not supposed to die and that she had to fight for her life. *Id*. When her in-laws eventually kicked her out, [redacted] brother-in-law threatened to kill her if she returned. *See* [redacted] Aff. ¶ 51, Ex. B.

C. [redacted] fled Burkina Faso to escape the abuse and entered the United States on May 12, 2016.

In May 2016, [redacted] fled Burkina Faso to escape the abuse from her husband and his family and to visit her sister in the United States. See [redacted] Aff. ¶ 64, Ex. B. She departed Burkina Faso on May 11, 2016 and landed in New York on May 12, 2016. *See id.*

During her time in the United States, [redacted] has found peace and safety. She has converted to Christianity, a religion she feels aligns better with her values but would lead to persecution if she returned to her Muslim region. *See* [redacted] Aff. ¶¶ 54-56, Ex. B. [redacted] knows that if she returns to Burkina Faso, her ex-husband and his family would hunt her down and beat or poison her as punishment for trying to find safety. *See* [redacted]. ¶¶ 62-63, Ex. B. She would be shunned for her conversion to Christianity and for being an unmarried woman who cannot have children. *See* [redacted] Aff. ¶¶ 71, 75, Ex. B. Wherever she went in Burkina Faso, [redacted] would be persecuted on account of her inability to have children, her opposition to FGM, and her religion.

II. LEGAL ARGUMENT

A. [redacted] should be granted asylum in the United States.

[redacted] is a refugee who qualifies for asylum in the United States. Under Section 101(a)(42)(A) of the Immigration and Nationality Act ("INA"), a "refugee" is

> "any person who is outside any country of such person's nationality…and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."

8 U.S.C. § 1101(a)(42)(A). While in the United States, [redacted] is outside her country of nationality, Burkina Faso, and she is unable and unwilling to return to and unable to avail herself of the protection of Burkina Faso due to past persecution and a well-founded fear of future persecution on account of her religion, political opinion, and membership in a particular social group.

Eligibility for asylum can arise from past persecution or a well-founded fear or likelihood of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *See Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004). "Private acts can [] constitute persecution if the government is unable or unwilling to control such actions." *Pan v. Holder*, 777 F.3d 540, 543 (2d Cir. 2015). Further, a "showing of past persecution gives rise to a rebuttable presumption of a well-founded fear of future persecution." *Id. See also Shi Liang Lin v. U.S. Dep't of Just.*, 494 F.3d 296, 300-301 (2d Cir. 2007), *and* 8 CFR 1208.13(b)(1) ("An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim.").

[redacted] meets these requirements and is entitled to asylum. She was persecuted in Burkina Faso on account of her membership in a particular social group and her political opinion. [redacted] faced persecution due to her membership in the particular social group of Burkinabe women who were excised and who cannot bear children. She also expressed opposition to FGM, which led to her persecution while living in Burkina Faso. This past persecution creates the rebuttable presumption of a well-founded fear of future persecution. If she were to return to Burkina Faso, she would still be opposed to FGM, which her husband's family already knows, and she would still be a Burkinabe woman who was excised and is unable to bear children. It would be extremely difficult for [redacted] to remarry and impossible to have children, so she would continue to face persecution if she were to return. Lastly, since [redacted] has converted to Christianity, her family and her community would persecute her on the basis of her religion.

The Burkinabe government is unable and unwilling to protect [redacted]. It is impossible and unreasonable for her to relocate within Burkina Faso because she would be shunned for being an unmarried woman without children and because she would still be in danger of her in-laws' retribution. Her ex-husband has also threatened to tell everyone she was sterile, rendering her unmarriageable. [redacted] in-laws would hunt her down and seek to beat or poison her in retaliation for not producing children, for escaping to the United States, and for converting to Christianity. Returning [redacted] to Burkina Faso would place her life in danger.

1. [redacted] Has Suffered Severe Past Persecution on Account of Her Membership in the Particular Social Group of Burkinabe Women Who Were Excised and Cannot Bear Children.

[redacted] has faced persecution on account of her membership in the particular social group of Burkinabe women who were excised and cannot bear children. The Board of Immigration Appeals ("BIA") has defined persecution under the INA as a "threat to life or freedom of, or the infliction of suffering upon, those who differ in a way that is regarded as offensive" and as encompassing behavior broader than threats to life or freedom. *See Matter of Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985), *overruled on other grounds*. The Second Circuit has previously held that persecution includes physical and sexual abuse, as well as threats. *See Vumi v. Gonzales*, 502 F.3d 150, 152 (2d Cir. 2007). [redacted] experienced this type of past persecution during her time in Burkina Faso.

[redacted] in-laws persecuted her due to her inability to have children. Burkinabe society finds women who cannot have children as "other," and there is a stigma around infertility. *See Merck Foundation calls for action together with 13 African First Ladies and 27 Ministers to Build Health Capacity,* Business Insider Africa (June 22, 2021), Ex. Z. Women who do not have children will often be threatened or beaten. *See* Amnesty Int'l, *Married at 13 – thousands of girls in Burkina Faso denied a childhood against their will* (May 18, 2020), Ex. AA. Her in-laws ridiculed and violently struck her for her inability to produce children. They called her worthless, kicked her out of the house, and forced her to sleep outside. [redacted] husband gave permission to his brother to kill her, saying it was within his right for her lack of children. *See* [redacted] Aff. ¶ 44, Ex. B. Her husband also taunted her and threatened to have her excised a second time. *See* [redacted] Aff. ¶¶ 43, 35, Ex. B. When [redacted] in-laws ultimately kicked her out of the house, [redacted] recalls her brother-in-law threatening to kill her if she ever returned. *See* [redacted] Aff. ¶ 51, Ex. B. She experienced threats and physical abuse on the basis of her

particular social group of excised Burkinabe women who could not have children. Her in-laws ridiculed her and threatened her life, and they continued to pose a threat to her even after she fled Burkina Faso. [redacted] father-in-law is a powerful religious leader who has the resources to find her and seek retaliation. Given the past persecution, [redacted] would face a threat to her life and safety if she were forced to return to Burkina Faso.

The BIA has found that membership in a particular social group requires three characteristics: "(1) immutability, meaning that members of the group must 'share a common, immutable characteristic,' (2) particularity, meaning that the group must 'be discrete and have definable boundaries,' and (3) social distinction, meaning that the group must 'be perceived as a group by society.'" *Ordonez Azmen v. Barr*, 965 F.3d 128, 134 (2d Cir. 2020) (internal citations omitted).

a. [redacted] social group is based on immutable characteristics.

To qualify as a social group, members of the group must "share a common, immutable characteristic." *Matter of Acosta*, 19 I. & N. Dec. at 233, *rev'd on other grounds* 19 I. & N. 439, 441 (B.I.A. 1987)); *see also I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987). The common characteristic of the group must be one that the members of the group "either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 231 (B.I.A. 2014). The social group here, Burkinabe women who were excised and cannot bear children, is not capable of change and shares a common, immutable characteristic. [redacted] cannot change her country of birth, her gender, or her history of excision. The Circuit courts have recognized gender as the basis of establishing a particular social group. *See Mohammed v. Gonzalez*, 400 F.3d 785, 797 (9th Cir. 2005) (finding females as a valid social group in the case of female genital mutilation); *see also Matter of A-R-C-G-*, 26 I&N 388, 392 (B.I.A. 2014) (finding that gender can be part of a particular social group, depending on the facts of the individual case).[1] While fertility treatments in a first world country may help her have children, they are very costly, and she would likely not be able to continue these in Burkina Faso. Further, fertility treatments do not always work. She would not be able to change the fact that she has no children so far and has struggled to become pregnant. Thus, members of the group of Burkinabe women who were excised and cannot bear children share a common, immutable characteristic.

b. [redacted] social group is socially distinct.

[redacted] social group is socially distinct because it is "perceived as a group by society." *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 240 (B.I.A. 2014). The social distinction requirement weighs whether "those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way." *Id.*, at 238. This requirement overlaps with the particularity requirement, as both focus on the applicant's fact-specific claims. *See Ordonez Azmen v. Barr*, 965 F.3d at 134-135. Women over a certain age without children are viewed as "other" in Burkina Faso. *See Merck Foundation*, Ex. Z. They are shunned and

[1] *See* 28 I&N Dec. 307 (A.G. 2021) (Attorney General Merrick Garland's June 16, 2021 decision to vacate *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), reinstated pre-*A-B-* precedent, including *Matter of A-R-C-G-*.)

considered without value. Further, women who have undergone excision but have been unable to produce children are viewed as improperly excised or impure. *See* [redacted] Aff. ¶ 41, Ex. B.

The particular social group need not be visibly distinct to people of all cultures. Rather, the characteristics of the social group can be "only discernible by people familiar with the particular culture." *Matter of M-E-V-G-*, 26 I. & N. Dec. at 236. The group has an "external perception component within a given society, which need not involve literal or 'ocular' visibility." *Id*. While women without children may be accepted in other parts of the world, what matters for the purposes of asylum is how they are perceived in Burkina Faso. Unmarried women without children are shunned in Burkina Faso and considered worthless. [redacted] in-laws threatened and physically abused her due to her inability to have children. It would also be difficult to remarry if a woman has not had children before a certain age, which would raise questions about her fertility. [redacted] ex-husband has threatened to tell everyone she was infertile, so she would be shunned. *See* [redacted] Aff. ¶ 48, Ex. B. She would be unable to marry and would remain an excised woman who had no children, and this status would be clearly apparent to others in Burkinabe society.

c. [redacted] social group is particular.

To be particular, a social group must be "discrete and have definable boundaries." *Matter of M-E-V-G-*, 26 I. & N. Dec. at 239. "[I]t must not be amorphous, overbroad, diffuse, or subjective," and it must "provide an adequate benchmark for determining who falls within the group." *Id.* The inquiry is fact-specific and focuses on how the society in which the group exists sees the group. *See Ordonez Azmen v. Barr*, 965 F.3d at 134. The agency must "determine on a case-by-case basis whether a group is a particular social group for the purposes of an asylum claim." *Id.* at 135. This fact-specific inquiry lays out the bounds of the social group.

[redacted] social group meets these requirements. The group of Burkinabe women who were excised and cannot have children is discrete with definable boundaries. While most Burkinabe women are excised, they can usually have children and are therefore respected. The few excised Burkinabe women who cannot have children stand apart from the rest of society as outcasts. Since a woman's value in Burkina Faso stems from her ability to produce and care for her family, a woman without children is considered to have no value. *See Married at 13*, Ex. AA. Further, girls are supposed to have as many children as their husbands want, regardless of what the girls themselves desire. *See id.* Excised women who cannot produce children are considered impure or improperly excised. They stand apart from other women in Burkina Faso due to their difference, and Burkinabe society shuns them as separate. It would be easy to mark [redacted] as a member of this particular social group and single her out for persecution on the basis of her membership. *See* Walker-Said Report, at ¶ 34, Ex. N.

2. [redacted] Has Suffered Past Persecution Due to Her Political Opinion.

In addition to being part of a particular social group, [redacted] has faced persecution on account of her political beliefs – her opposition to FGM. The meaning of "political opinion" is broad and does not require membership in a political party or the adoption of a particular political theory. *See Mandebvu v. Holder*, 755 F.3d 417, 429 (6th Cir. 2014). To obtain relief on the basis of a political opinion, an applicant does not have to be a member of a political party, as the "INA

protects individuals who do not belong to a political party to the same degree as those who do." *Toure v. Att'y General of the U.S.*, 443 F.3d 310, 320 (3rd Cir. 2006). Rather, the applicant must show that persecution arises from her own political opinion and not just a generalized political motive. *See Hirpa v. Holder*, 327 F.App'x 265, 267 (2d Cir. 2009). Moreover, to claim persecution on account of an applicant's political opinion, the applicant need not argue persecution solely on account of political opinion. *See Vumi v. Gonzalez*, 502 F.3d at 156. She may combine this claim with other grounds for asylum.

A claim of political persecution must consider the political context and country conditions. *See Vumi v. Gonzalez*, 502 F.3d at 156. In Burkina Faso, excision is exceedingly common. FGM remains widespread, with around 76 percent of girls and women aged 15 to 49 years having undergone FGM. *See* UNICEF, *Burkina Faso: Statistical Profile on Female Genital Mutilation/Cutting*, May 2020, at 4, Ex. U. Both men and women support female genital mutilation, and "anyone departing from the norm may face condemnation, harassment, and ostracism." World Health Organization, *Eliminating female genital mutilation: An interagency statement of OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, WHO* (2008) at 5, Ex. O. Following her traumatic experience and ensuing complications, [redacted] is strongly and vocally opposed to FGM. If [redacted] were to return to Burkina Faso, she would be persecuted due to her opposition to FGM. Her former father-in-law and her ex-husband know of her opposition and would seek to punish her for her opposition and her efforts to escape to the United States.

3. [redacted] Likely Would Face Future Persecution on Account of Her Religion.

Additionally, [redacted] has a well-founded fear of future persecution on account of her religion. While she grew up Muslim, [redacted] converted to Christianity in 2017, while she was in the United States. *See* Pastor [redacted] Supporting Declaration ([redacted] Decl.), Ex. G; *see also* [redacted] Aff. ¶ 54, Ex. B. She was baptized in the United States in May 2021. *See* [redacted] Decl., Ex. G; *see also* Certificate of Baptism, Ex. I. To claim asylum on religious persecution grounds, the applicant must show past persecution or that they fear future persecution on the basis of religion. *See Rizal v. Gonzales*, 442 F.3d 84, 90 (2d Cir. 2006). Letters from a priest proving active membership in a Church as well as a baptismal certificate can qualify as evidence to corroborate an applicant's identity as a Christian. *See Rizal*, 442 F.3d at 91. [redacted] letter from Pastor [redacted], her letter from her Church confirming her attendance at worship services, her certificate of baptism, and her affidavit all demonstrate her conversion to Christianity and dedication to the religion.

Further, evidence of country conditions demonstrating opposition to and violence against Christians can support a claim of future persecution. *See Rizal*, 442 F.3d at 91-93. There can be persecution when the government, "although not itself conducting the persecution, is unable or unwilling to control it." *Rizal*, 442 F.3d at 92. Following the 2006 census, 61 percent of Burkina Faso is Muslim, 19 percent is Roman Catholic, 4 percent is Protestant, and 15 percent is solely indigenous beliefs. *See* U.S. Dep't of State, Burkina Faso 2020 International Religious Freedom Report (2020) at 2, Ex. X. In 2020, Burkina Faso experienced several reported attacks on Christians. *Id.* at 5-6. In 2020, Christians continued to be forced from their homes due to violence at the hands of Islamic extremists. *See* Open Doors, *World Watch List 2021: Burkina Faso*, Ex.

BB. Conversion to Christianity from Islam "is extremely uncommon and largely considered an act of apostasy and cultural treason." Walker-Said Report, at ¶ 10, Ex. N. Converting to a religion different from her family would be seen as rejecting her community and would make her vulnerable to attack by Islamic jihadist groups attacking her village, given the rise of religious militancy and religious violence. *See id.* With these incidents and Christianity as a minority religion in Burkina Faso, the opposition to and violence against Christians, as demonstrated by the country conditions, support [redacted] fear of future persecution.

[redacted] experiences with her in-laws also demonstrate the danger of returning to Burkina Faso as a Christian. Her ex-father-in-law is a marabout, a Muslim religious leader, who would strongly oppose her conversion to Christianity. *See* [redacted] Aff. ¶¶ 59, 63, Ex. B. Even though she has divorced her husband, [redacted] would still experience future persecution from her in-laws since they would seek to harm her after she sought a better life in the United States and for converting to Christianity. Her ex-husband has already demanded to know her whereabouts from her family and would seek to punish her for her actions. *See* [redacted] Aff. ¶ 52, Ex. B. Further, [redacted] own family would reject her for converting to Christianity. When [redacted] mother visited her in the United States in 2020, her mother told her the day she converted to Christianity would be the day she was no longer a member of the family. *See* [redacted] Aff. ¶ 58, Ex. B. There are no Christians in [redacted] hometown, and violence against Christians is widespread in Burkina Faso. *See* U.S. Dep't of State, *Burkina Faso 2020 International Religious Freedom Report (2020)*, at 5-6, Ex. X. Further, "Christians who have converted from Islam also face significant pressure and opposition from their families and communities. Families may reject Christian converts, and new Christians may be pressured to renounce their new faith." *See* Open Doors, Ex. BB.

[redacted] need not prove that the persecution she would face would be certain. "An alien's fear [of future persecution] may be well-founded even if there is only a slight, though discernible, chance of persecution." *Diallo v. INS*, 232 F.3d 279, 284 (2d Cir. 2000). Physical harm inflicted on account of an applicant's religious beliefs can establish a well-founded fear of future persecution. *See Chen v. U.S. I.N.S.*, 359 F.3d 121, 128 (2d Cir. 2004) (finding that the persecution must be more than mere harassment but that non-life-threatening violence and physical abuse qualified). Since [redacted] converted to Christianity after arriving in the United States, she cannot use past persecution to prove a well-founded fear of future persecution. However, her experience living with her religious in-laws has taught her the danger of returning to Burkina Faso as a Christian. She also does not know any Christians in Burkina Faso and has been explicitly told she would be rejected for her religion. With her personal experience of her husband's family, her mother's proclamation, and the country conditions revealing violence against and opposition to Christians, [redacted] has a legitimate and well-founded fear of future persecution on account of her conversion to Christianity.

4. The Government of Burkina Faso is Unable or Unwilling to Protect [redacted].

   a. In order to prove asylum, [redacted] must show the government is unable or unwilling to protect her.

The Burkinabe government is unable and unwilling to protect [redacted] from persecution. Courts in the Second Circuit recognize that mistreatment by private actors can rise to the level of persecution if the government is unable or unwilling to control the private actors. "[I]t is well established that private acts may be persecution if the government has proved unwilling [or unable] to control such actions." *Pavlova v. INS*, 441 F.3d 82, 91 (2d Cir. 2006); *Aliyev v. Mukasey*, 549 F.3d 111, 116 (2d Cir. 2008). In determining whether the government is unwilling or unable to control a group, evidence includes country conditions, such as U.S. State Department reports, which must be considered in determining government willingness and ability to control private actors. *See Sangare v. Holder*, 330 F.App'x. 320, 322 n. 2 (2d Cir. 2009). All evidence that establishes "that authorities are unwilling and unable to protect against persecution" is relevant. *Martinez-Segova v. Sessions*, 696 F.App'x. 12, 13–14 (2d Cir. 2017) (holding that the BIA "failed to sufficiently consider the country conditions evidence in analyzing whether [Petitioner] demonstrated that the Salvadoran government was unable or unwilling to protect her from her husband"); *Aliyev*, 549 F.3d at 116.[2] Thus, the asylum office must consider the relevant country conditions in Burkina Faso.

Failing to report a crime is not necessarily fatal to the asylum claim. *See Martinez-Segova*, 696 F.App'x. at 13–14. An applicant does not have to demonstrate they made a report to the police to establish unwillingness to protect. *See Doe v. Att'y Gen. of the U.S.*, 956 F.3d 135, 146 (3rd Cir. 2020). Instead, the applicant can "fill the evidentiary gap" by "1) demonstrating that a country's laws or customs effectively deprive the petitioner of any meaningful recourse to governmental protection, 2) describing [p]rior interactions with the authorities, 3) showing that others have made reports of similar incidents to no avail, 4) establishing that private persecution of a particular sort is widespread and well-known but not controlled by the government, or 5) convincingly establish[ing] that [reporting] would have been futile or [would] have subjected [the applicant] to further abuse." *See id.* (finding Ghanaian law deprives gay men of any meaningful recourse to protection and that reporting the incident would be futile) (citing *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1066-1067 (9th Cir. 2017)). If the police were unwilling to protect a similarly-situated refugee, this can help prove the government is unable or unwilling to protect the applicant. *See Pan v. Holder*, 777 F.3d 540, 545 (2d Cir. 2015). In particular, the Second Circuit has held that an applicant's knowledge of local custom and knowledge of other women who have been excised can suffice to show the persecution would likely occur and that the government would not be able to stop it. *See Abankwah v. I.N.S.*, 185 F.3d 18, 25 (2d Cir. 1999). Thus, [redacted] can prove that the authorities in Burkina Faso are unwilling and unable to protect her based on country conditions, common knowledge, and her previous experience.

b. Burkina Faso Continues to Mutilate Women.

FGM remains prevalent in Burkina Faso, despite its criminalization. The Second Circuit Court of Appeals has found that while the Burkinabe government clearly recognized and criminalized the practice of FGM, the number of prosecutions was insignificant. *See Abankwah*, 185 F.3d at 25. FGM remains widespread, with around 67.6% of women having undergone FGM as of 2015, despite its criminalization in 1996. *See* Amnesty Int'l, *Burkina Faso: Difficult Journey*

[2] The Second Circuit has declined to determine "precisely what a person must show in order for the government to be deemed responsible for the conduct of private actors," but the applicant should "introduce[] enough evidence to forge the link between private conduct and public responsibility." *Aliyev*, 549 F.3d at 118.

Towards Human Rights Respect, Amnesty Int'l Submission for the UN Universal Periodic Review, 30th Session of the UPR Working Group (May 2018), Ex. R. FGM, where practiced, is "deeply entrenched in social, economic and political structures." *See* World Health Organization, *Eliminating female genital mutilation* (2008), at 5, Ex. O. Where practiced, it is "supported by both men and women, usually without question, and anyone departing from the norm may face condemnation, harassment, and ostracism…In view of this conventional nature of female genital mutilation, it is difficult for families to abandon the practice." *Id*. Even though "FGM is banned, tradition and custom hold such sway that the practice continues to take place secretly in deplorable sanitary conditions, and there have been only occasion prosecutions." Amnesty Int'l, *Burkina Faso: Urgent need to protect girls from FGM and forced marriage* (Oct. 2018), at 2, Ex. Q. Twenty-five years after its criminalization, FGM remains prevalent and has simply moved underground. The practice of "FGM is so widespread and ingrained into traditional culture in Burkina Faso that…criminalization by the state has not resulted in the elimination of the practice, which is performed on 82 percent of women in Muslim Burkinabé communities." Walker-Said Report, ¶ 11(A), Ex. N. The Burkinabe government is both unwilling to intervene in FGM and unable to prevent its occurrence.

c. Burkina Faso's government does not get involved in domestic affairs.

The Burkinabe government has been hesitant to intervene in domestic affairs and would not be able to protect [redacted] from domestic violence or persecution on account of her political opinion or particular social group. [redacted] marriage to [redacted] was a solely religious marriage, and they had a religious divorce. The government of Burkina Faso would not intervene in a religious marriage. In Burkina Faso, many marriages are performed religiously, without the presence of a state official, which deprives the "union" of legal recognition and protection. *See* Amnesty Int'l, *Burkina Faso: Submission to the United Nations Human Rights Committee,* AFR 60/4066/2016 at 5 (2016), Ex. Y. This leads to a gap in the law and the protection of women. *See id.* In Burkina Faso, there are widespread social norms justifying spousal violence, and "34% of the population agree that a husband is justified in beating his wife under certain circumstances." *Burkina Faso Social Institutions and Gender Index (Burkina Faso-SIGI),* OECD Social Institutions and Gender Index, at 5, Ex. V. The police in Burkina Faso are "reluctant to intervnee in cases of local/domestic violence even when a member of the family is assaulted or threatened with kidnapping or death." Walker-Said Report, ¶ 31, Ex. N. As a result, Burkinabe authorities do not often intervene in domestic affairs, particularly when the marriage is a religious one. [redacted] former in-laws already have threatened her upon her return to Burkina Faso and previously committed violence against her. The Burkinabe government would be unlikely to intervene to protect her.

Local authorities routinely disregard laws that protect women and girls in favor of upholding custom and tradition, which instead sanction and uphold violence against women and girls. Burkinabé society has been reluctant to report cases of abuse against women to the authorities, and there is little policing to protect women's rights. *See* Walker-Said Report, ¶ 11(D), Ex. P. Further, the "authorities may be unwilling or unable to interfere with traditional practices, because they are considered family or community matters, deeply entrenched and widely followed." Annemarie Middelburg & Alina Balta, *Female Genital Mutilation/Cutting as a*

Ground for Asylum in Europe, 28 Int'l J. of Refugee L. 3 at 446 (2016), Ex. W. Despite the existence of laws to protect women, the authorities are unlikely to enforce the laws in the context of domestic affairs. In particular, religious leaders such as [redacted] father-in-law "are part of indigenous governance structures in Burkina Faso that…have broad access across the country through ethnic networks and family lineages located in every town and village in Burkina Faso and can also use the police to their advantage." Walker-Said Report, ¶ 11(C), Ex. N. "As a religious cleric and family elder, [redacted] father-in-law would also likely have the local authority to punish [redacted] with beatings, violence, or torture without the interference of local law enforcement, especially since her crime could be interpreted as a crime against Islam, which falls under the jurisdiction of the Islamic clerics." *Id.* The police routinely fail to protect women from social or cultural abuse, as they are preoccupied with fighting organized crime, border crimes, and terrorism. *See id.*, at ¶ 27. This failure to protect women and girls leaves women like [redacted] vulnerable to the violence inflicted by their spouses and families. Thus, if [redacted] were forced to return to Burkina Faso, the Burkinabe government would be unwilling to protect [redacted] from the persecution she would face at the hands of her ex-husband and her in-laws.

5. [redacted] is Entitled to a Presumption of a Well-Founded Fear of Future Persecution.

Because [redacted] has established past persecution and has shown the government is unable or unwilling to protect her, she is entitled to a rebuttable presumption that she possesses a well-founded fear of future persecution. *See* 8 C.F.R. § 208.13(b)(1)(i). This presumption can only be rebutted if there is a fundamental change of circumstances or if [redacted] could avoid persecution by relocating within Burkina Faso, if reasonable. *See* 8 C.F.R. § 208.13(b)(1)(i)(A)-(B). An applicant who shows past persecution has a rebuttable presumption that she faces a threat of future persecution. *See Kone v. Holder*, 596 F.3d 141, 147 (2d Cir. 2010). The burden then falls on the government to rebut the presumption by showing that a fundamental change in circumstances has occurred such that the applicant's life or freedom would not be threatened or a reasonable possibility of relocation in the country of removal. *Id.*

There has been no fundamental change in circumstances affecting [redacted] situation. The conditions in Burkina Faso have not improved significantly since [redacted] fled in May 2016. Requiring [redacted] to relocate would be ineffective and unreasonable, because her husband's family would find her and continue to persecute her. Further, no matter where she lived in Burkina Faso, she would still be an unmarried Christian woman with no children, in a Muslim society that only values women for their childbearing and domestic capabilities. She would be shunned and have nowhere to live.

[redacted] experience of FGM creates a presumption of a well-founded fear of future persecution. A petitioner need not fear the repetition of the exact type of harm suffered in the past. *See Hassan v. Gonzalez*, 484 F.3d 513, 518 (8th Cir. 2007) (finding that petitioner does not need to establish a fear of suffering FGM a second time to show she would face persecution). The future persecution need not be the same as the past persecution. *See Kone v. Holder*, 596 F.3d at 149 (where the court found that domestic violence and rape could qualify as future persecution for victims of past female genital mutilation). [redacted] has a well-founded fear of future persecution in the form of domestic violence due to her status as a Burkinabe woman who has been excised and who cannot bear children, her past experience of FGM, and her past experience of

domestic violence. Even though she would likely not be living with her ex-husband if she were forced to return, he and his family have threatened to find her and hurt her. She need not prove that she would suffer the exact same harm, but she would suffer a similar harm to that suffered in the past.

[redacted] need not prove a high likelihood of persecution. An applicant's "fear may be well-founded even if there is only a slight, though discernible, chance of persecution." *Vumi v. Gonzalez*, 502 F.3d at 153. [redacted] does not need to prove that it is highly likely that her former in-laws will seek to harm her, that she would be shunned and excluded on account of her religion, or that she would face persecution due to her status as an excised Burkinabe woman who cannot have children. She must show the slight, discernible chance of persecution, which her past persecution helps establish. As such, [redacted] is entitled to the presumption of a well-founded fear of future persecution on account of her past persecution.

a. There has been no fundamental change of circumstances.

There has been no substantial change in the circumstances in Burkina Faso since [redacted] departure five years ago. In this case, the government cannot show changed circumstances and cannot show how any generally changed conditions would alter or affect [redacted] situation. To show changed conditions, the government "must 'conduct an individualized analysis of how changed conditions would affect the specific petitioner's situation'" and "cannot rely in a conclusory fashion on information in a State Department country report about 'general changes in the country.'" *Passi v. Mukasey*, 535 F.3d 98, 101–102 (2d Cir. 2008) (quoting *Tambadou v. Gonzales*, 446 F.3d 298, 303 (2d Cir. 2006)). Despite the existence of some prosecutions of the perpetrators of FGM, Burkina Faso has not succeeded significantly in combating the practice and has not been able to protect its women.

While some country conditions evidence may show increased prosecution, the reality for an individual in [redacted] position has not changed dramatically. While country condition reports can be useful and informative in demonstrating the conditions of a country, they are not binding. *See Chen v. U.S. I.N.S.*, 359 F.3d 121, 128 (2d Cir. 2004). When such a country condition report "suggests that, *in general*, an individual in the applicant's circumstances would not suffer or reasonably fear persecution in a particular country, the immigration court may consider that evidence, but it is obligated to consider also any contrary or countervailing evidence with which it is presented, as well as the particular circumstances of the applicant's case demonstrated by testimony and other evidence." *Id.*

Burkina Faso outlawed FGM twenty-five years ago, but despite all the time that has passed, the national rate of FGM still remains as high as 65% to 76% nationally. *See* Amnesty Int'l, *Burkina Faso: Urgent need to protect girls from FGM and forced marriage* (Oct. 2018), at 2, Ex. Q. Between 2003-2010, the rate nationally increased from 72.5% to 75.8%. *See* 28 Too Many at 29, Ex. T. Further in Burkina Faso today, as noted above, it remains true that "[t]he physical integrity of women has limited protection," and violence against women is "widely tolerated." *See* 28 Too Many at 35, Ex. T. Women are often denied the right to own property and land, are refused social security and labor protections, and violence against women and girls persist at high rates and with relative impunity across the country. As mentioned above, the Burkinabe authorities would still be unlikely to intervene in a domestic violence situation. She would remain just as in

danger today as she was in 2016. As such, there has been no fundamental change in circumstances in the country such that [redacted] can feel assured of protection from persecution or otherwise eliminate her well-founded fear that she will experience serious harm and suffering if returned to Burkina Faso.

b. Relocating in Burkina Faso would be ineffective and unreasonable.

Relocation must be reasonable under the totality of circumstances. *See* 8 C.F.R. § 208.13(b)(1)(i)(B). There are two separate inquiries to determine whether an applicant could relocate within her home country: (1) whether safe relocation is possible, and if so, (2) whether it would be reasonable to expect the applicant to safely relocate. 8 C.F.R. §§ 1208.13(b)(2)(ii), 1208.13(b)(3)(I)). In the case of FGM, the impossibility of relocation can be shown by testimony and country conditions information, such as evidence that "1) FGM is widely practiced in [the country]; 2) acts of violence and abuse against women in [the country] are tolerated by the police; 3) the Government . . . has a poor human rights record; and 4) most African women can expect little governmental protection from FGM." *Matter of Kasinga*, 21 I & N Dec. 357, 367 (B.I.A. 1996). Other relevant factors as to the reasonableness of relocation include "whether the applicant would face other serious harm" in relocating, "geographical limitations," and "social and cultural constraints, such as age, gender, health, and social and familial ties." 8 C.F.R. § 1208.16(b)(3). As mentioned above, 1) FGM is still widely practiced in Burkina Faso, 2) the police are unlikely to intervene in domestic affairs and violence against women, 3) the Burkina Faso government has a poor human rights record, and 4) Burkinabe women can expect little government protection from FGM despite its criminalization.

[redacted] also cannot relocate to escape domestic violence, and it would not be reasonable to expect her to relocate. [redacted] brother-in-law has threatened to kill her if she returned to the neighborhood. Both [redacted] mother and her former in-laws live in the same village, so she would not be safe if she went to live with either. Further, if she were to relocate to another village, her husband's family would likely be able to find her. [redacted] father is a marabout, a Muslim religious leader, with connections and the ability to find people. She would not be safe from him and would continue to fear persecution. It would also be unreasonable to force her to leave all of her family and friends and live in a strange new city, where she does not know anyone. Here in the United States, [redacted] has her sister and her Church, but she would be forced to start over if she had to relocate in Burkina Faso. She would also have fewer opportunities as a woman in Burkina Faso and would struggle to protect herself.

Even if she were able to hide from her husband, no matter where she goes, [redacted] would still be an unmarried Christian woman and would be shunned in Burkina Faso. Since Burkina Faso has traditional gender norms, there would be questions as to why a woman of her age does not have children or a husband. Any future husband would ask questions and would learn that she could not bear children, decreasing her value in a traditional society. [redacted] would still face opposition to her Christianity and would be shunned by her family. She would be alone in the world, without the support system she has here in the United States, and persecuted due to her inability to bear children after being excised. Burkinabe society does not accept such women. Thus, relocation in Burkina Faso would be ineffective and unreasonable.

6. [redacted] Both Subjectively and Objectively Fears Future Persecution.

Even if [redacted] did not benefit from the presumption of past persecution, she would qualify for asylum because she has a well-founded fear of future persecution. An applicant can qualify for asylum if she can show "there is a reasonable possibility of suffering such persecution if he or she were to return" to her country of origin. *See* 8 C.F.R. §208.13(b)(2)(i). To establish a well-founded fear of future persecution, an applicant must demonstrate that her fear is subjectively genuine and objectively reasonable. *See Gomez v. I.N.S.*, 947 F.2d 660, 663 (2d Cir. 1991); *see also Huang v. U.S. I.N.S.*, 421 F.3d 125, 128 (2d Cir. 2005). The applicant must show, first, that she subjectively fears persecution and, second, that the fear is objectively reasonable. *See Jian Hui Shao v. B.I.A.*, 466 F.3d 497, 501 (2d Cir. 2006). This "fear may be well-founded even if there is only a slight, though discernible, chance of persecution." *Vumi v. Gonzalez*, 502 F.3d at 153 (citing *Diallo v. I.N.S.*, 232 F.3d 279, 284 (2d Cir. 2000)). [redacted] can prove that her fear of future persecution is subjectively genuine and objectively reasonable.

a. [redacted] has a subjective fear of future persecution.

The question of subjective fear is a fact-intensive inquiry, specific to the applicant. *See Jian Hui Shao v. B.I.A.*, 465 F.3d at 501. An applicant must provide credible testimony that she "subjectively fears persecution." *Jin Chen v. Holder*, 526 F.App'x. 85, 87 (2d Cir. 2013). Subjective persecution can be proved through the applicant's credible testimony that her fear is genuine. *See Ramsameachire v. Ashcroft*, 357 F.3d at 178. [redacted] is terrified of being forced to return to Burkina Faso. *See* Applicant's Asylum Appl. Form I-589, Ex. A. She suffered abuse at the hands of her ex-husband and his family and faced threats they have made upon her life and her safety. [redacted] knows and subjectively fears that her ex-husband's family will find her and hurt her if she returns to Burkina Faso. Her experience growing up as a Muslim in a Muslim-dominated village and hearing her mother say she would be rejected for being a Christian has instilled in her a reasonable fear of persecution on the basis of religion. Lastly, her experience with her ex-husband's family and their knowledge of her opposition to FGM have led her to reasonably fear persecution on the basis of her political opinion. [redacted] cries nearly every time she discusses the possibility of having to return. As a result, she has a subjective fear of future persecution based on her past experience of persecution and on her personal knowledge of what circumstances await her return.

b. [redacted] fear of future persecution is objectively reasonable.

[redacted] fear of returning is objectively reasonable because "a reasonable person in her circumstances would fear persecution." *Huang v. U.S. I.N.S.*, 421 F.3d at 128. To show objective reasonableness, the applicant must provide documentary evidence or testimony from which it can be inferred that she would face persecution on the basis of one of the five categories: race, religion, nationality, political opinion, or membership in a particular social group. *See Gomez v. I.N.S.*, 947 F.2d at 663. Objective reasonableness relies on context and believability through reliable, objective supporting evidence. *See Ramsameachire v. Ashcroft*, 357 F.3d at 178. Asylum applicants can demonstrate the objective component by showing persecution in the past or by showing they have a good reason to fear future persecution. *See Canalaes-Vargas v. Gonzales*, 441 F.3d 739, 743 (9th Cir. 2006).

Further, an applicant need not demonstrate a reasonable possibility that he will be singled out for persecution "if he can demonstrate that there is a pattern or practice … of persecution of a group of persons similarly situated to the applicant, and the applicant is a member of the group, such that his or her fear of persecution upon return is reasonable." *Ramsameachire v. Ashcroft*, 357 F.3d at 183 (internal citations and quotations omitted). Therefore, [redacted] can demonstrate the objective reasonableness of her fear with country conditions evidence.

[redacted] fears are objectively reasonable because they are substantiated by the country conditions in Burkina Faso. In total, these circumstances establish at the very least a ten percent chance that she will be persecuted if returned to Burkina Faso, which is what the law requires. *See Canalaes-Vargas v. Gonzales*, 441 F.3d at 743; *see also Vumi v. Gonzalez*, 502 F.3d at 153. A well-founded fear does not require certainty or even a probability of persecution. *See Canalaes-Vargas v. Gonzales*, 441 F.3d at 743. Threats of death by an organization or individuals capable of carrying them out are sufficient for evidence of an objectively reasonable fear of future persecution. *See id*. at 743-44.

Based on her past experience and testimony, [redacted] has an objectively reasonable fear of future persecution on the basis of her membership in a particular social group of excised Burkinabe women who cannot bear children, her religion, and her political opinion. Her ex-husband's family has threatened to kill her if she returned, and she knows that her powerful father-in-law is capable of poisoning or beating those who oppose him. *See* [redacted] Aff. ¶¶ 71, 73, Ex. B. If she were to return, she would have nowhere to hide, since her mother lives in the same neighborhood as her ex-husband's family and because her ex-husband's family has connections and would be able to find her. As mentioned above, the government would be unlikely to intervene in what they would view as an internal family affair. Norms in Burkina Faso justify spousal violence against women, as a third of Burkinabe society agree that a husband is justified in beating his wife under certain circumstances. *See Burkina Faso Social Institutions and Gender Index (Burkina Faso-SIGI)*, OECD Social Institutions and Gender Index, at 5, Ex. V. [redacted] mother has told her she would no longer be a part of her family if she returned as a Christian. *See* [redacted] Aff. ¶ 58, Ex. B. The majority of Burkina Faso is Muslim, and Burkina Faso experienced several religiously motivated attacks on Christians in 2020. *See* U.S. Dep't of State, Burkina Faso 2020 International Religious Freedom Report (2020), at 2, 5-6, Ex. X. Christians continued to face violence at the hands of Islamic extremists in 2020 and were forced into refugee camps. *See* Open Doors, Ex. BB. "The police in Burkina Faso do not enforce the law criminalizing FGM, nor do they protect women from other forms of gender-based violence such as domestic violence or family-based violence." Walker-Said Report, ¶ 18, Ex. N. Women "do not have a legal basis on which to challenge myriad forms of violence against them…even lethal violence meted out against them by their spouses or their spouse's families." *Id.*, at ¶23. Thus, [redacted] fear of persecution is supported by the evidence.

The country conditions evidence and [redacted] own experience with her family and with her in-laws reveal an objectively reasonable fear of future persecution. A reasonable person who was excised and unable to bear children, who returns as a Christian to a majority-Muslim village, and who opposes FGM in a conservative community, would reasonably fear persecution on the basis of her membership in a particular social group, her religion, and her political opinion. Thus,

[redacted] has satisfied the requirements of a well-founded fear of future persecution, establishing the basis for an asylum claim.

7. The One-Year Bar to Asylum Should be Excused.

Although [redacted] has filed her asylum claim a few days outside of the one-year bar, she falls under the extraordinary circumstances exception due to her severe illness in the months preceding the deadline. The law requires applicants to file for asylum within one year after the date of the applicant's arrival in the United States. *See* 8 U.S.C.A. §1158(a)(2)(B). However, this one-year bar may be disregarded in the case of changed circumstances that materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing. *See* 8 U.S.C.A. §1158(a)(2)(D); *see also Ordonez Azmen v.* Barr, 965 F.3d at 137. [redacted] delay in filing was a result of her severe illness that directly preceded the deadline. She was unable to file for asylum due to her severe illness and urgent need for medical attention.

Since her excision, [redacted] had experienced painful intense stomach pains, fibroids in her uterus, painful and extended menstrual cycles, and resulting anemia. In the months leading up to the one-year anniversary of her time in the United States, [redacted] became very ill but was nervous about seeking medical treatment in the United States due to immigration concerns. In or about May 2017, she fainted in her sister's home and had to go to the hospital. *See* [redacted] Aff. ¶ 65, Ex. B. The hospital found she was severely anemic and needed a blood transfusion. *See* [redacted] Dec. ¶ 10, Ex. M; *see also* Medical Records, at pp. 4, 10, Ex. K. She had been very ill for some time, and her illness had become debilitating, leading to the delay in her application.

In fact, [redacted] submitted her application *before* the one-year deadline, as evidenced by her signature on the original I-589, which is dated May 10, 2017, two days before the one-year deadline. *See* Original I-589, Ex. L. The USCIS receipt notice, while dated May 19, 2017, notes that they received her application on May 15, 2017. *See* Receipt Notice, Ex. L. May 15 is three days after May 12, 2017, which marks one year after [redacted] arrival in the United States. Thus, she applied on time, and USCIS only received her application three days late.

[redacted] meets all three requirements for extraordinary circumstances. To plead extraordinary circumstances, the applicant must show "(1) the circumstances were not intentionally created by the applicant; (2) the circumstances were directly related to the applicant's failure to file the application within the 1-year period; and (3) the delay was reasonable under the circumstances." *Abankwah v. Lynch*, 632 F.App'x 670, 672 (2d Cir. 2015) (holding that while serious illness may constitute extraordinary circumstances, it will not justify a seven-year delay in filing). First, [redacted] did not create her illness; it resulted from her uterine fibroids. Second, her illness was directly related to her delay in filing, as she was preoccupied with her illness and therefore unable to submit the paperwork in time. Third, the delay was reasonable under the circumstances, as she only missed the deadline by three days, unlike the seven-year delay in *Abankwah v. Lynch*.

The definition of a reasonable period has not been definitively determined, but here [redacted] *de minimis* delay of three days should certainly constitute a reasonable delay. The regulations require that an applicant who seeks to prove extraordinary circumstances show they filed the application within a reasonable period given the circumstances. *See* 8 C.F.R.

§1208.4(a)(5); *see also Bouchikhi v. Holder*, 676 F.3d 173, 178 (5th Cir. 2012); *see also Umirov v. Whitaker*, 760 F.App'x 17, 19 (2d Cir. 2019). While there is no bright-line rule on what reasonable means, *see Apriyandi v. Holder*, 573 F.App'x.43, 45 (2d Cir. 2014), asylum seekers should apply for asylum status as soon as possible after their status expires. *See Matter of T-M-H- & S-W-C-*, 25 I. & N. Dec. 193 (B.I.A., 2010) (where the court found that six months or longer would not be considered reasonable). The government should consider "shorter periods of time…on a case-by-case basis, with the decision-maker taking into account the totality of the circumstances." *Matter of T-M-H- & S-W-C-*, 25 I. & N. Dec. 193 (B.I.A., 2010). [redacted] three-day delay is significantly shorter than six months and should be considered reasonable given her illness directly preceding her filing.

The law did not intend to bar asylum applications filed a couple of days late. Senator Hatch, former Chairman of the Judiciary Committee, commented on the changed and extraordinary circumstances exception, stating it was "intended to 'ensur[e] that those with legitimate claims of asylum are not returned to persecution, particularly for technical difficulties.' 142 Cong. Rec. S11, 840 (daily ed. Sept. 30, 1996) (statement of Sen. Hatch)." *Ordonez Azmen v. Barr*, 965 F.3d at 138. Thus, [redacted] three-day delay should not invalidate her claim for asylum and force her to return to the abuse and potentially deadly conditions that await her in Burkina Faso. The asylum office should grant her the extraordinary circumstances exception to the one-year bar. Further, [redacted] only missed the deadline by a few days. She signed and posted her original I-589 on May 10, 2017, which was two days before the one-year mark of her arrival in the United States. *See* Original I-589, Ex. L. In its receipt notice dated May 19, 2017, USCIS noted they had received her I-589 on May 15, 2017, only three days past the one-year mark. *See* Receipt Notice, Ex. L. For such a small amount of time, [redacted] asks the Asylum Office to consider the extraordinary circumstances of her illness as excusing the delay of a few days.

8. No Other Bars to Asylum Apply.

No other bars to asylum apply. Affirmative bars include whether the applicant 1) participated in persecution, 2) was convicted of a serious crime in the United States, 3) committed a serious nonpolitical crime outside of the United States, 4) poses a danger to the United States, and 5) attained firm resettlement in a third country before arriving to the United States. *See* INA §208(b)(2)(A)-(B). [redacted] has never participated in persecution, been convicted of a serious crime in the United States, committed a serious nonpolitical crime outside of the United States, or presented a danger to the United States.

She also has not attained firm resettlement in another country. For the purposes of asylum, an individual is "considered firmly resettled only if, prior to arrival in the United States, he or she entered into another nation with, or while in that nation received, an offer of permanent residence status, citizenship, or some other type of permanent resettlement." 8 C.F.R. §208.15. On her journey to the United States, [redacted] had a brief layover in France, but she never left the airport. She did not have status in France and knew she was not entitled to status there. She did not establish any lawful status in France, has no family there, and continued on to the United States. Therefore, [redacted] did not obtain firm resettlement in a third country before reaching the United States.

B. [redacted] Is Entitled to a Humanitarian Exception on the Basis of Her Past Persecution in the Form of Female Genital Mutilation.

1. [redacted] Has Suffered Past Persecution of Female Genital Mutilation.

[redacted] past experience of FGM can serve as the basis of a claim of asylum. The practice of FGM can serve as the basis of a claim of past persecution if the applicant establishes "(1) the FGM constituted persecution; (2) the alien belonged to a particular social group; and (3) there was a nexus between the FGM and membership in the group – that is, the FGM was performed on account of her membership in that group." *Niang v. Gonzalez*, 422 F.3d 1187, 1197 (10th Cir. 2005).

First, several circuits have held that FGM constitutes persecution, either for past persecution or to determine a well-founded fear of persecution. *Niang v. Gonzalez*, 422 F.3d at 1197 (citing to *Mohammed v. Gonzalez*, 400 F.3d 785, 795 (9th Cir. 2005), *Abay v. Ashcroft*, 368 F.3d 634, 638 (6th Cir. 2004), and *Nwaokolo v. INS*, 314 F.3d 303, 308 (7th Cir. 2002)). The Circuits have recognized that "the mutilation of women and girls is a horrifically brutal procedure, often performed without anesthesia that causes both short-and long-term physical and psychological consequences." *Benyamin v. Holder*, 579 F.3d 970, 976 (9th Cir. 2009) (citing to *Nwaokolo v. INS*, 314 F.3d 303, 308 (7th Cir. 2002)). [redacted] was a victim of FGM at the age of ten in 1990. Thus, her experience of FGM constitutes persecution.

Second, women of specific tribal groups who are typically excised can constitute a particular social group. The BIA does not require more than gender plus a tribal membership to identify a social group. *See Niang v. Gonzalez*, 422 F.3d at 1200. Nearly all Wala women in Burkina Faso are excised. Simply living as a woman in a country that excises women could lead to a "well-founded fear of persecution based solely on gender given the prevalence of FGM." *Hassan v. Gonzalez*, 484 F.3d at 518. As a member of the Wala group, [redacted] was excised at the age of ten. Therefore, she is a member of the particular social group of Wala women.

Third, there must be a connection between the persecution and the membership in the particular social group. *See Niang v. Gonzalez*, 422 F.3d at 1200. An applicant may establish past persecution on account of being a member of a social group of women in a culture that mutilates genitalia. *See Mohammed v. Gonzalez*, 400 F.3d at 797. [redacted] experienced FGM because of her membership in the particular social group of Wala women. As Burkinabe society excises nearly all Wala women, [redacted] excision resulted from her membership in the group. *See* Walker-Said Report, at ¶ 11(A), Ex. N. Thus, [redacted] suffered past persecution of female genital mutilation on the basis of her membership in the group of Wala women.

2. [redacted] is Entitled to the Humanitarian Exception.

In cases of severe past persecution, the BIA can grant humanitarian asylum. The humanitarian exception allows a victim of past persecution to be granted asylum even without a fear of future persecution if the applicant can show "(1) compelling reasons for being unwilling or unable to return because of the severity of the past persecution, 8 C.F.R. §1208.13(b)(1)(iii)(A), or (2) a reasonable possibility that she may suffer other serious harm upon returning to that country, 8 C.F.R. §1208.13(b)(1)(iii)(B)." *Mohammed v. Gonzalez*, 400 F.3d at 801. FGM can constitute

a particularly severe form of past persecution that qualifies for humanitarian asylum. *See Benyamin v. Holder*, 579 F.3d at 977; *see also Mohammed v. Gonzalez*, 400 F.3d at 801. As a result, based on her past persecution, [redacted] is entitled to asylum. She has demonstrated both compelling reasons for being unable and unwilling to return, based on her traumatic experiences and fears of future harm, and a reasonable possibility of other serious harm if she returns.

In addition, [redacted] is entitled to asylum due to her past persecution and fear of future harm. Humanitarian asylum can be appropriate in some cases of female genital mutilation if the applicant establishes she will face future harm that is not related to a protected ground. *See Kone v. Holder*, 596 F.3d at 152. The applicant must show the existence of a reasonable possibility that she will suffer other serious harm upon removal. *See id.* The serious harm need not be inflicted on account of race, religion, nationality, membership in a particular social group, or political opinion but must be severe enough to qualify as persecution. *See id.* Even if the asylum office finds that [redacted] fear of harm by her in-laws is not on the basis of a protected ground, she has proven a reasonable possibility of other serious harm upon removal that qualifies as persecution. Thus, she deserves the humanitarian exception.

C. [redacted] Qualifies for Withholding of Removal Under INA § 241(b)(3).

In the alternative, [redacted] qualifies for withholding of removal. The Immigration and Nationality Act "requires the Attorney General to withhold deportation of an alien who demonstrates that his 'life or freedom would be threatened' on account of one of the listed factors if he is deported." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. at 423. The applicant must show that it is "more likely than not" that she will be persecuted on account of a protected ground upon removal. *See id.*; *see also I.N.S. v. Stevic*, 467 U.S. 407, 429-430 (1984); *see also Vanegas-Ramirez v. Holder*, 768 F.3d 226, 237 (2d Cir. 2014). To obtain withholding of removal, the applicant must show a "clear probability of persecution upon removal" and that one central reason for persecution is one of the five protected grounds. *See Rubio v. Wilkinson*, 846 F.App'x. 41, 42 (2d Cir. 2021). Refugees "who can show a clear probability of persecution are entitled to mandatory suspension of deportation and eligible for discretionary asylum, while those who can only show a well-founded fear of persecution are not entitled to anything, but are eligible for the discretionary relief of asylum." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. at 444; *see also I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 419 (1999).

[redacted] is eligible for withholding of removal because it is more likely than not that her life and safety will be threatened on account of her membership in a particular social group, her religion, and her political opinion. As explained above, [redacted] suffered a past threat to her safety, as her in-laws physically and verbally abused her due to her membership in the particular social group of excised Burkinabe women who cannot have children. Her ex-husband also threatened to have her excised a second time and has sought to learn her whereabouts after her escape to the United States. This creates a rebuttable presumption that it is more likely than not that there will be a future threat to [redacted] safety. *See* 8 C.F.R. §1208.16(b)(1)(i). There has been no fundamental change of circumstances in Burkina Faso such that the government can rebut the presumption of a future threat to life or freedom. *See* Section I.A.5.a above; *see also* 8 CFR §1208.16(b)(1)(i)(A). Internal relocation within Burkina Faso is unavailable because her ex-husband and in-laws could find her, and she would still be an unmarried Christian woman who cannot bear children. *See* Section I.A.5.b above; *see also* 8 C.F.R. §1208.16(b)(1)(i)(B). Thus, it

is more likely than not that [redacted] would be persecuted upon her return to Burkina Faso. She is therefore entitled to a mandatory suspension of deportation. Based on the clear probability of persecution upon removal, [redacted] qualifies for withholding of removal.

D. [redacted] Also Qualifies for Protection Under the Convention Against Torture

[redacted] also qualifies for relief under the Convention Against Torture ("CAT"). CAT relief does not require a nexus to a protected ground. *See Aliyev v. Mukasey*, 549 F.3d at 116 n.5. Rather, she need only prove that "it is more likely than not that [she] … would be tortured if removed to [Burkina Faso]." 8 C.F.R. §1208.16(c)(2). The law defines torture as:

> "[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as … intimidating or coercing him … when such pain or suffering is inflicted by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity."

8 C.F.R. §1208.18(a)(1). Torture includes "prolonged mental harm caused by or resulting from … [t]he intentional infliction or threatened infliction of severe physical pain or suffering" or "[t]he threat of imminent death." *Id.*, §1208.18(a)(4)(i), (iii).

[redacted] need only show that the government acquiesced to torture by knowing of or remaining willfully blind to the activity constituting torture and failing to prevent it. See id., §1208.18(a)(7); *Delgado v. Mukasey*, 508 F.3d 702, 708 (2d Cir. 2007). Government acquiescence does not require consent or approval, just that "government officials know of or remain willfully blind to an act and thereafter breach their legal responsibility to prevent it." *Delgado v. Mukasey*, 508 F.3d at 708. The asylum office must consider the cumulative effect of the applicant's experience in determining whether she is entitled to relief. *See Poradisova v. Gonzales*, 420 F.3d 70, 79 (2d Cir. 2005).

As explained above, [redacted] has suffered severe pain, both mental and physical, through her FGM and the physical and verbal abuse from her in-laws due to her inability to have children. Experiencing FGM at a young age was a traumatic experience that still remains with her, both physically and emotionally. [redacted] in-laws have inflicted such severe pain and suffering that they pushed her to attempt suicide and forced her from their home. As outlined above, the Burkinabe government will not intervene in what they see as domestic affairs, and they have been ineffective in stopping FGM. Taken together, these incidents rise to the level of harm contemplated by the statute. Thus, [redacted] merits protection under CAT.

III. CONCLUSION

In sum, [redacted] should be granted asylum. In the alternative, [redacted] should be granted withholding of removal under the Act and the Convention Against Torture. [redacted] respectfully requests that the Asylum Office grant this application in its entirety.

Respectfully submitted,

Jamie Brensilber
DLA Piper LLP (US)
1251 Avenue of the Americas, 27th Floor
New York, NY 10020
Tel: 212-335-4553
Fax: 917-778-8845
jamie.brensilber@us.dlapiper.com

Attorney for Petitioner

Applicant Details

First Name	**Adam**
Last Name	**Bresgi**
Citizenship Status	**U. S. Citizen**
Email Address	**adam.bresgi@columbia.edu**
Address	**Address** **Street** **369 Grand Ave, Apt 3** **City** **Brooklyn** **State/Territory** **New York** **Zip** **11238** **Country** **United States**
Contact Phone Number	**2014140114**

Applicant Education

BA/BS From	**Wesleyan University**
Date of BA/BS	**May 2014**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 10, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Columbia Science and Technology Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Funk, Kellen
krf2138@columbia.edu
5056093854
Pozen, David
dpozen@law.columbia.edu
2128540438
Hecker, Sean
shecker@kaplanhecker.com
(212) 763-0883

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Adam Bresgi
369 Grand Ave., Apt. 3, Brooklyn, NY | (201) 414-0114 | adam.bresgi@gmail.com

June 8, 2023

The Honorable Kiyo Matsumoto
United States District Court
Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am a class of 2021 alumnus of Columbia Law School, writing to apply for a clerkship in your chambers for the 2025-2026 term. Since graduation, I have been employed in the New York office of Kaplan Hecker & Fink LLP. In this role, I have had the privilege of working on a wide range of civil and criminal matters in federal district and appellate courts, including on the recent *Carroll v. Trump* trial.

My resume, transcript, and writing sample are enclosed. You should also be receiving letters of recommendation from Sean Hecker of Kaplan Hecker & Fink, Professor David Pozen, and Professor Kellen Funk. I would be happy to provide any additional information you might require. Thank you for your consideration.

Very truly yours,

Adam Bresgi

ADAM BRESGI

369 Grand Ave., Apt. 3, Brooklyn, NY | (201) 414-0114 | adam.bresgi@gmail.com

EDUCATION

Columbia Law School, New York, NY
J.D., May 2021

Honors: Hamilton Fellowship (merit-based full tuition scholarship)
James Kent Scholar (highest honors)
Harlan Fiske Stone Scholar
Dean's Honors *in* Federal Courts, Evidence, & Criminal Adjudication

Activities: *Columbia Science and Technology Law Review*, Executive Managing Editor
Research Assistant: Professors David Pozen, Kathryn Judge, & Jedidiah Purdy
Teaching Assistant: Constitutional Law *with* Professor David Pozen (Fall 2020)
Civil Procedure *with* Professor Kellen Funk (Fall 2020)
Knight First Amendment Institute Extern (Fall 2019)

Wesleyan University, Middletown, CT
B.A. in English and Creative Writing, *with honors*, received May 2014

Honors: Dean's List (all semesters)
Snopes Short Fiction Prize, Honorable Mention

Thesis: "As Written" (narrative fiction)

Activities: Wesleyan's Center for Prison Education, Writing Tutor
The Argus News Magazine, Executive Editor

Study Abroad: University of Cape Town, Cape Town, South Africa (Fall 2012)

EXPERIENCE

Kaplan, Hecker, & Fink LLP, New York, NY — August 2021–Present
Associate
Research and draft briefs filed in federal appellate and district courts. Aid in preparation for and presentation of high-profile trial in Southern District of New York. Coordinate discovery process in civil and criminal matters.

Federal Trade Commission, Northeast Region, New York, NY
Legal Intern — June 2019–July 2019
Conducted legal research and drafted internal memoranda on consumer protection and competition matters. Led privilege review of seized documents in anticipation of litigation.

Panorama Education, Boston, MA
Operations Manager — January 2018–August 2018
Maintained internal knowledge management system. Led FERPA and GDPR compliance efforts for a growth-stage start-up. Served on the Privacy and Security working group.

The Tuesday Company, Remote
Thought Leadership Coordinator — September 2017–August 2018
Managed media operation, which sought to expand the conversation around digital electoral tools. Developed thought leadership material to demonstrate digital organizing efficacy in specific political climates.

Kramer Levin Naftalis and Frankel, LLP, New York, NY
Litigation Paralegal — July 2014-July 2016
Provided extensive legal research to attorneys and cite-checked motions, briefs, and other court filings. Led large-scale discovery reviews and productions. Organized the logistical and peripheral elements of a multi-day trial.

Office of United States Senator the Honorable Kirsten Gillibrand, Washington, D.C.
Legislative Intern — June 2014-July 2014
Drafted memoranda summarizing select congressional hearings for legislative aides. Worked with the constituent relations team to appropriately respond to constituent calls and correspondence. Led tours of the Capitol.

Columbia Law School

Registration Services

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registrar@law.columbia.edu

CLS TRANSCRIPT (Unofficial)

09/17/2021 21:34:00

Program: Juris Doctor

Adam R Bresgi

Spring 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6645-2	Columbia Science and Technology Law Review Editorial Board		1.0	CR
L6169-1	Legislation and Regulation	Bulman-Pozen, Jessica	4.0	A
L6363-1	Professional Responsibility Issues in Public Interest Practice	Genty, Philip M.	3.0	A
L9328-1	S. Political Theory and the 1st Amendment	Blasi, Vincent; Verrilli, Donald B.; Wu, Timothy	3.0	A-
L6685-1	Serv-Unpaid Faculty Research Assistant	Purdy, Jedediah S.	2.0	A

Total Registered Points: 13.0

Total Earned Points: 13.0

Fall 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6645-2	Columbia Science and Technology Law Review Editorial Board		1.0	CR
L6473-1	Labor Law	Barenberg, Mark	4.0	A-
L6272-1	Land Use	Heller, Michael A.	3.0	A
L8990-1	S. Current Issues in Civil Liberties and Civil Rights [Major Writing Credit - Earned]	Shapiro, Steven	2.0	CR
L6822-1	Teaching Fellows	Funk, Kellen Richard	4.0	CR

Total Registered Points: 14.0

Total Earned Points: 14.0

Spring 2020

Due to the COVID-19 pandemic, mandatory Credit/Fail grading was in effect for all students for the spring 2020 semester.

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6645-1	Columbia Science and Technology Law Review		0.0	CR
L6238-1	Criminal Adjudication	Shechtman, Paul	3.0	CR
L6241-1	Evidence	Capra, Daniel	4.0	CR
L6425-1	Federal Courts	Funk, Kellen Richard	4.0	CR
L6683-1	Supervised Research Paper	Judge, Kathryn	2.0	CR

Total Registered Points: 13.0

Total Earned Points: 13.0

Fall 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6645-1	Columbia Science and Technology Law Review		0.0	CR
L6231-3	Corporations	Judge, Kathryn	4.0	A-
L6299-1	Ex. The Knight First Amendment Institute	DeCell, Caroline	2.0	A-
L6299-2	Ex. The Knight First Amendment Institute - Fieldwork	DeCell, Caroline	3.0	CR
L6229-1	Ideas of the First Amendment [Minor Writing Credit - Earned]	Blasi, Vincent	4.0	A
L6685-1	Serv-Unpaid Faculty Research Assistant	Pozen, David	2.0	A

Total Registered Points: 15.0

Total Earned Points: 15.0

Spring 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6133-1	Constitutional Law	Greene, Jamal	4.0	A-
L6108-1	Criminal Law	Rakoff, Jed	3.0	A
L6679-1	Foundation Year Moot Court	Strauss, Ilene	0.0	CR
L6121-3	Legal Practice Workshop II	Amend, Andrew W.	1.0	P
L6116-3	Property	Heller, Michael A.	4.0	A-
L6183-1	The United States and the International Legal System	Waxman, Matthew C.	3.0	A-

Total Registered Points: 15.0

Total Earned Points: 15.0

January 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-5	Legal Methods II: Transnational Law and Legal Process	Cleveland, Sarah	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2018

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-2	Civil Procedure	Landau, Joseph	4.0	A-
L6105-2	Contracts	Morrison, Edward R.	4.0	A-
L6113-2	Legal Methods	Strauss, Peter L.	1.0	CR
L6115-3	Legal Practice Workshop I	Amend, Andrew W.; Neacsu, Dana	2.0	P
L6118-2	Torts	Underhill, Kristen	4.0	A

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 86.0

Total Earned JD Program Points: 86.0

Dean's Honors

A special category of recognition in Spring 2020 awarded to the most outstanding students in each course (top 3-5%).

Semester	Course ID	Course Name
Spring 2020	L6238-1	Criminal Adjudication
Spring 2020	L6241-1	Evidence
Spring 2020	L6425-1	Federal Courts

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2020-21	James Kent Scholar	3L
2019-20	James Kent Scholar	2L
2018-19	Harlan Fiske Stone	1L

Pro Bono Work

Type	Hours
Mandatory	40.0
Voluntary	14.0

Columbia Law School

June 09, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Re: ***Recommendation for Adam Bresgi***

Dear Judge Matsumoto:

I write to recommend Jonah Baskin (Columbia '23) for a clerkship in your chambers during the earliest available term. Mr. Baskin was a stand-out student in a large and talented Federal Courts class this past semester. He earned James Kent honors (Columbia's highest level currently), and I am certain he will make an excellent clerk.

In a class of 118 students, Mr. Baskin stood out for his tireless preparation, a front-row student with an abiding curiosity when it came to the thornier issues of federal jurisdiction. He regularly attended office hours, thus giving other students the benefit of his perceptive questions and our conversations about the finer points of doctrine. Mr. Baskin was clearly following the Supreme Court's term through the course of the semester and often brought up cases from the Court's docket to ask how the doctrines we were learning might apply (or be altered) by those cases.

An additional point is worth making in light of the challenges of the past semester. Although Columbia has returned to "normal" classroom conditions, I and my colleagues noticed a drastic reduction in engagement and even attendance this year compared to our largely virtual semesters early in the pandemic. While I would ordinarily treat consistent attendance and preparation to be on-call as taken for granted to merit a recommendation, those seem like real achievements during a semester when even many excellent students gave up on the course halfway through and decided to gamble their grade on a final week of cramming. Mr. Baskin was not a gambler. He worked hard consistently all semester and was one of my anchor students—one I could rely on to be engaged and could look to in order to know if my notes and lectures were making sense. He earned an A by a fair margin and submitted one of the best exams I have seen in the course.

I have gotten to know Mr. Baskin particularly well through our discussion of climate change litigation, the strategic choices that have been made and could be made, and the utilities (or not) of addressing climate change through litigation in the first place. In these discussions he has shown himself to be a careful and deep thinker, one who does not let his passion for particular policy outcomes obscure his considered judgment or strategic wisdom.

Having taught Federal Courts at Columbia for five years now, I have had the opportunity to get to know many sharp and ambitious students. Mr. Baskin is certainly among the top tier. When recommending clerks, I rely on the standards I learned from my own judges, Lee H. Rosenthal of the Southern District of Texas and Stephen F. Williams of the D.C. Circuit. Both judges had formidable, exacting standards for writing that was concise, efficient, and clear, and for clerks that were responsible, thoughtful, and engaging. By those standards, I would have leapt at the chance to hire Mr. Baskin, and I hope you will strongly consider his candidacy.

I am available by phone or e-mail at 505-609-3854 and krf2138@columbia.edu if you would like to discuss Mr. Baskin's application further.

Sincerely,

Kellen Funk
Professor of Law

COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027

June 08, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Re: Adam Bresgi

Dear Judge Matsumoto:

It is my pleasure to recommend 2021 Columbia Law School graduate Adam Bresgi for a clerkship in your chambers. Adam was one of the best students I've ever had and will be a stellar clerk.

Columbia lured Adam away from other top law schools with a full merit scholarship, known as the Hamilton Fellowship. Each Hamilton Fellow is assigned a faculty mentor upon arrival in Morningside Heights. Adam was paired with me. Even though Adam never took one of my classes, I worked closely with him in a variety of capacities—and in every one of them, he was superb.

As my research assistant, Adam was the sole student who helped me prepare an article, coauthored with NYU law professor Adam Samaha, on what Samaha and I refer to as the "anti-modalities" of constitutional argument. Every constitutional scholar is familiar with the so-called modalities of constitutional law, or the forms of reasoning that are considered legitimate within the legal profession for establishing propositions about the Constitution's meaning (textual arguments, precedential arguments, structural arguments, and so on). Our article explored the flip side of the modalities: the forms of reasoning that are regularly employed in non-constitutional debates over public policy and political morality but are considered illegitimate in debates over the Constitution's meaning, including policy arguments, partisan arguments, and logrolling arguments. As the RA for this project, Adam wrote lengthy research memoranda on prior scholarship concerning the modalities, on prior scholarship concerning anything resembling our "anti-modalities" idea, and on discussions of the anti-modalities (however labeled) in case law. For all of these assignments, Adam produced meticulous, deep, and insightful memos that were a significant help to Professor Samaha and me. Indeed, Adam did such a good job as my RA that I recommended him to my colleagues Kate Judge and Jed Purdy, both of whom hired Adam for their own research projects and later thanked me profusely for it.

As my teaching assistant, Adam helped me enormously as I struggled to teach Constitutional Law over Zoom during the pandemic. Adam's formidable tech skills came in handy many times over. And his preternaturally poised and calm manner turned out to be an enormous asset in a time of crisis, as many of the 1Ls indicated that they found Adam to be a source of emotional as well as academic support. On the substance, Adam was also unusually adept at simplifying and clarifying complex concepts. Adam later served as a Civil Procedure TA for my colleague Kellen Funk and, from what Professor Funk shared with me, he excelled in that role as well.

As my Hamilton mentee, Adam was a delight. Not only did he flourish in all of his classes—never once receiving a grade out of the A range—but he also had a genuine passion for studying the law that made our meetings together a highlight of the month for me rather than a chore. Still to this day, whenever Adam and I speak, I find the minutes fly by as we dive into discussing recent cases, academic debates, and the like. Even with its total absence of B's, Adam's transcript undersells how well he did at Columbia. During the spring of his 2L year, the law school issued no formal grades because of the pandemic. We instead allowed instructors to recognize exceptional performance with "Dean's Honors"—and every one of Adam's instructors that semester (in Federal Courts, Evidence, and Criminal Adjudication) awarded him that honor. Adam's evidence instructor, Daniel Capra of Fordham Law, went further and told Adam that he would have received the single highest mark in the class had there been grades.

Since graduating last year, Adam has been working as an associate at Kaplan, Hecker and Fink, where they have had him doing a wide range of tasks: plaintiff-side civil rights litigation, appellate practice, criminal defense work, and complex civil litigation. He was the only member of the Columbia class of 2021 to receive an offer to work at the firm, and by all accounts he has been thriving there. Although I thought it clear that Adam was ready to clerk the moment he graduated, he will be an even more valuable asset in chambers on account of his time in practice.

In sum, Adam was a brilliant student, a beautiful writer, and a lovely human being, and he's only gotten better since graduating. I see no negatives, only a rare pairing of raw talent with admirable humility, intellectual curiosity, and dedication to legal craft. I recommend Adam on the strongest possible terms and hope you will give him a close look.

If I can be of any further assistance, please do not hesitate to contact me.

Respectfully,

David Pozen - dpozen@law.columbia.edu - 2128540438

David Pozen

David Pozen - dpozen@law.columbia.edu - 2128540438

KAPLAN HECKER & FINK LLP

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DIRECT DIAL 212.763.0889
DIRECT EMAIL shecker@kaplanhecker.com

June 1, 2023

To Whom It May Concern:

Re: Clerkship Application of Adam B

I am very pleased to write in support of the
Adam is one of the very best young lawyers wi
legal practice; I could not recommend him more
him even for a short period – as described bel
his time at our firm — I could not be more ex
to learn and grow as a federal law clerk. Ada
brilliant, thoughtful, exceptionally hard work

Adam joined Kaplan Hecker & Fink LLP almost
associate at our Firm in 2020. Adam first im
established himself as among the most mature,
group of law students. Adam had spent a num
(including as a paralegal), and simply had mo
law school class. He already understood the w
Although summer associate stints are short-te
who could handle associate-level work and who

When Adam returned to our firm last fall, he
joined a small team I led in representing a l
securities fraud dispute with a group of soph
over document discovery, and oversaw a team t
associates and contract lawyers, a job more t
firms. In addition, Adam communicated direct
disputes, drafted significant portions of moti
lawyers for oral argument on those motions.
expert and drafted sections of a mediation sta
in which Adam participated and to which he co

KAPLAN HECKER & FINK LLP

I can use too many superlatives to describe A
young lawyer. He's whip smart, with incredib
He writes exceptionally well and produces wr
tremendous intellectual curiosity, which driv
factual problems. In short, he's precisely th
any type of case.

During the almost nine months that I worked
remarkable docket of significant cases, inclu
prominent SPAC in perhaps the most high-profi
different individuals in a significant market
United States Attorney's Office for the South
successfully sued former President Trump for
Commonwealth of Pennsylvania in connection wi
questions concerning the judicial authority t
short, Adam has had just an incredible experi
And each of my partners who has worked with A

In short, I could not recommend Adam to you mo
any questions you might have, but you simply
clerk.

Sincerely

Sean Hecker

SH: sl

ADAM BRESGI

369 Grand Ave., Apt. 3, Brooklyn, NY

(201) 414-0114 | adam.bresgi@gmail.com

Columbia Law School, J.D. 2021

Clerkship Application Writing Sample

This writing sample is an excerpt from the first draft of an amicus brief filed in the United States Court of Appeals for the Seventh Circuit in *Mays v. Dart*, 947 F.3d 810 (7th Cir. 2020). The case was on appeal from the United States District Court for the Northern District of Illinois, 456 F. Supp. 3d 966 (N.D. Ill. 2020). Plaintiffs alleged that they were subjected to unconstitutional conditions of confinement arising from the jail's mismanagement of the COVID- 19 pandemic. The district court agreed and ordered the Cook County Sheriff to remediate the unconstitutional conditions. The Sheriff appealed.

A central issue in the case was whether the Sheriff's partial compliance with the Center for Disease Control's guidance for prisons during COVID-19 was sufficient to establish that the conditions of confinement in the Cook County Jail were objectively reasonable. On behalf of prison law scholars, we argued that it was not. I drafted the summary of the argument, and the first section of the argument. My first draft, which was not edited by others, is reproduced below with permission.

SUMMARY OF THE ARGUMENT

This case comes to the Court under unprecedented circumstances. As the COVID-19 pandemic has locked down most of the country, up to 750,000 people are incarcerated in city and county jails at any given time. The virus has found a home among these populations, turning correctional facilities like the Cook County Jail into viral hot spots and killing detainees, guards, and community members alike.

Though the circumstances are unprecedented, the law in this area is well-settled. Many of those incarcerated in these jails—including Plaintiffs below—are pretrial detainees, presumed innocent until proven guilty. The Fourteenth Amendment prohibits detaining those who have not been convicted of any crime in conditions that "amount to punishment." *Bell v. Wolfish*, 441 U.S. 520, 537 (1979). In the Seventh Circuit, conditions of confinement amount to punishment if they are objectively unreasonable. *Hardeman v. Curran*, 933 F.3d 816, 823 (7th Cir. 2019).

The question before this Court is straightforward: What conditions of confinement are objectively unreasonable in the midst of a global pandemic?

The Center for Disease Control ("CDC") has released guidelines for managing the spread of COVID-19 in Correctional Facilities. The Sheriff of Cook County has argued that evidence of his attempted compliance with these guidelines should be enough to prove that his conduct was objectively reasonable. Even assuming the Sheriff complied with the Guidelines, such compliance is not determinative of objective reasonableness under the Fourteenth Amendment. While agency guidelines may be relevant in determining whether conduct is reasonable, courts have long cautioned that compliance with professional standards or guidelines does not *per se* establish compliance with the Constitution. Further, courts have only deferred to this material to the extent it is reliable and relevant.

While parts of the CDC Guidelines are owed significant deference under this analysis, two points counsel circumspection: First, the hurried process through which the Guidelines were developed and announced weaken their claim to reliability. Second, the Guidelines contain "feasibility carveouts" that only apply to correctional facilities, and thereby undermine any presumption that they set a constitutionally acceptable minimum safety standard.

This Court should follow the path taken by the District Court below. The CDC Guidelines may be important and informative, but they do not establish the constitutional minima under the Fourteenth Amendment.

ARGUMENT

I. Professional Standards and Agency Guidelines Do Not Represent the Constitutional Minima under the Fourteenth Amendment.

The Due Process Clause protects pretrial detainees from conditions of confinement that "amount to punishment." *Bell v. Wolfish*, 441 U.S. 520, 537 (1979). Put simply, there is no constitutional rationale for allowing the government to punish pretrial detainees who "have not been convicted of anything." *Miranda v. Cty. of Lake*, 900 F.3d 335, 350 (7th Cir. 2018). Following this reasoning, pretrial detainees need only show that a defendant's conduct is objectively unreasonable to prevail on a claim under the Fourteenth Amendment. *Kingsley v. Hendrickson*, 576 U.S. 389, 395 (2015).

The Seventh Circuit has extended *Kingsley*'s objective reasonableness analysis "to all Fourteenth Amendment conditions of confinement claims brought by pretrial detainees." *Hardeman v. Curran*, 933 F.3d 816, 823 (7th Cir. 2019). Other circuits have also held that this objective standard reaches beyond the facts of *Kingsley*. *See Darnell v. Pineiro*, 849 F.3d 17, 34–35 (2d Cir. 2017) (applying the objective standard to conditions of confinement claims); *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1120, 1122–25 (9th Cir. 2018) (applying the objective standard

to medical-need claims). In these circuits today, if a pretrial detainee can show that their conditions of confinement are objectively unreasonable—that is, "not 'rationally related to a legitimate nonpunitive governmental purpose' or . . . 'appear excessive in relation to that purpose,'"—those conditions are unconstitutional under the Fourteenth Amendment. *Kingsley*, 576 U.S. at 398 (quoting *Bell*, 441 U.S. at 561).[1]

As a result, the objective reasonableness standard requires a factbound analysis. Courts must "focus on the totality of facts and circumstances faced by the [defendant and] gauge objectively—without regard to any subjective belief held by the individual—whether the response was reasonable." *McCann v. Ogle Cty.*, 909 F.3d 881, 886 (7th Cir. 2018).[2] This analysis cannot be applied "mechanically," *Kingsley*, 576 U.S. at 397, and courts must often look for help when deciding whether specific conduct and conditions are objectively unreasonable.

Professional standards, like those promulgated by the American Correctional Association ("ACA"), and agency guidelines, like EPA regulations, can prove useful tools for courts analyzing constitutional standards in this area of the law. Where everyday experience does not inform what is

[1] This is a new development in the doctrine. Until recently, courts had analyzed all conditions of confinement challenges under the Eighth Amendment standard. *Miranda*, 900 F.3d at 350. This more exacting standard requires plaintiffs to show that (1) the conditions of confinement objectively deny "the minimal civilized measure of life's necessities, and (2) prison officials are deliberately indifferent to this state of affairs." *Gray v. Hardy*, 826 F.3d 1000, 1005 (7th Cir. 2016) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). The objective reasonableness standard is seemingly coextensive with the objective prong of the Eighth Amendment standard, but to the extent there is daylight between the two analyses, pretrial detainees are entitled to at least as much protection as convicted prisoners. *Cavalieri v. Shepard*, 321 F.3d 616, 620 (7th Cir. 2003).

[2] The Sheriff's Brief tries to parse the *Kingsley* standard in two ways. First, the Sheriff argues that "the Court evaluates the objective reasonableness of the defendant's *conduct* in response to the alleged conditions, not the conditions themselves." Opening Br. at 28 (emphasis in original). One need not play this metaphysical game. Because the standard is objective, the reasonableness of the conduct is entirely dependent on the reasonableness of the conditions. Pretrial detainees may not be confined in conditions that are objectively unreasonable because such conditions amount to punishment. If a jailer's conduct, regardless of its rigor or intent, does not remedy the unreasonableness of those conditions, that conduct is, likewise, objectively unreasonable. Second, the Sheriff contends that the district court took too narrow a view when evaluating his conduct. *Id*. In essence, the Sheriff reads the precedent to absolve him of liability so long as he acts in good faith, regardless of whether the conditions of confinement are unconstitutional. The Sheriff accurately describes the Eighth Amendment standard. But adopting the same reading of the objective reasonableness standard would make the two analyses indistinguishable and erase all precedent that has analyzed these claims since *Kingsley*.

objectively reasonable, standards and guidelines can help orient. *United States v. Brown*, 871 F.3d 532, 538 (7th Cir. 2017). At the same time, courts have cautioned against over-reliance on this material. Though they "may be instructive in certain cases," it is well-settled that these standards and guidelines "simply do not establish the constitutional minima." *Bell*, 441 U.S. at 543 n.27.

The nature of objective reasonableness compels this logic. Because the standard requires fact-intensive analysis, professional guidance may offer useful foundational information, especially in complicated or novel situations. Courts applying this standard must adopt "the perspective of a reasonable [official], including what the [official] knew at the time, not with the 20/20 vision of hindsight . . . [and] account for the legitimate interests that stem from the government's need to manage the facility in which the individual is detained." *Kingsley*, 576 U.S. at 397 (internal quotations and alterations omitted). To the extent guidelines and standards can help a factfinder understand a particular situation, they may prove valuable. In deciding whether an official's conduct is reasonable, for example, a judge might want "to know how officers typically act in like cases," and expert guidance can be a useful starting point for this inquiry. *United States v. Brown*, 871 F.3d at 537 (applying the objective reasonableness standard in a Fourth Amendment excessive force case). Indeed, the more factually complex a situation is, the more likely a judge is to benefit from the views of professional organizations. *Id.* at 538. And this is especially true in the correctional context, where professional guidelines "may be relevant when determining what is obtainable and what is acceptable in corrections philosophy." *Brown v. Plata*, 563 U.S. 493, 540 (2011).

But for precisely the same reason that these materials can be helpful, they also cannot be dispositive of the constitutional question. In a totality of the circumstances analysis, no single directive can be determinative. *Thompson v. Chicago*, 472 F.3d 444, 454 (7th Cir. 2006). Moreover, the constitutional floor in conditions of confinement cases is set by "evolving standards

of decency." *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981). Even if it were possible for professional standards or guidelines to capture the prevailing consensus on minimal human decency, this material does not purport to do that work. Rather, these organizations and agencies often—though not always—publish guidance to establish better, more desirable conditions.[3] This is essential work, but it is not necessarily coextensive with the constitutional mandates of the Eighth and Fourteenth Amendments. *Id.* at 348 n.13 (noting that while the Court may agree with professional guidelines, that alone was not dispositive because "there is no evidence in this case that [the condition] is viewed generally as violating decency"); *Plata*, 563 U.S. at 540 (cautioning that "courts must not confuse professional standards with constitutional requirements"); *Bell*, 441 U.S. at 543 n.27 (reasoning that professional guidelines do not set the constitutional baseline because "they [only] establish goals recommended by the organization in question"); *Tillery v. Owens*, 907 F.2d 418, 426 (3d Cir. 1990) ("Because we look to societal standards as our benchmark, expert opinions and professional standards, while instructive, are not determinative."); *Inmates of Occoquan v. Barry*, 844 F.2d 828, 839 (D.C. Cir. 1988) (rejecting the district court's analysis in part because it was over-reliant on "standards promulgated by various professional organizations or 'agreement' among the experts"); *Cody v. Hillard*, 830 F.2d 912, 914 (8th Cir. 1987) ("The Supreme Court has explicitly rejected the proposition that such standards establish a constitutional norm.").

Additionally, prudential considerations counsel against not tying together constitutional and professional standards. First, the purpose of professional guidelines is inconsistent with a constitutional standard like objective reasonableness. Guidelines are designed to change and follow developments in their fields. *See, e.g.*, *Standards*, AMERICAN CORRECTIONAL ASSOCIATION.

[3] The American Correctional Association, for example, publishes manuals that are "designed to enhance correctional practices for the benefit of inmates, staff, administrators, and the public." *Standards*, AMERICAN CORRECTIONAL ASSOCIATION.

But objective reasonableness should not "vary from place to place and from time to time." *Brown*, 871 F.3d at 537 (7th Cir. 2017) (citing *Whren v. United States*, 517 U.S. 806, 815 (1996)). Pretrial detainees have an absolute right to be free from punishment. Thus, conditions of confinement that amount to punishment *must* be unconstitutional in all cases, in all times, and in all places, regardless of the judgement of an agency or an organization.

Second, organizations and agencies are not designed or equipped to do the work of federal courts. "[I]t is absurd to suggest that the federal courts should subvert their judgment as to alleged Eighth Amendment violations to [a professional organization] whenever it has relevant standards." *Gates v. Cook*, 376 F.3d 323, 337 (5th Cir. 2004). Federal courts, not organizations or agencies, "have a duty . . . to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Expertise may prove valuable to a court and relevant to a particular set of circumstances, but it may not replace a court's analysis whole cloth.

Finally, guidelines and standards are only as valuable as they are relevant and reliable. In an objective reasonableness analysis, a judge should defer to this material only to the extent it represents an objectively reasonable reality. In assessing the relevance and reliability of standards and agency guidance, courts consider (1) whether the materials are an exercise or expression of professional, evidence-based expertise; (2) whether they were developed according to an iterative or otherwise appropriately rigorous process; (3) whether they purport to establish a baseline of acceptable safety procedures; and (4) whether it is appropriate to apply the standards to a given case. The following examples illustrate this approach.

i. The American Correctional Association Standards

The ACA was established in 1870 and began developing standards for American prisons in the 1940s. *The History of Standards & Accreditation*, AMERICAN CORRECTIONAL ASSOCIATION. For the last eighty years, the ACA has published and updated their standards to reflect the correctional

field's evolving understanding of the professional operation of jails and prisons. *Id.* The Committee on Standards—which consists of twenty experts from the correctional community—meets bi-annually to update and revise the existing standards and to create, draft, and test new standards. *Committee on Standards*, AMERICAN CORRECTIONAL ASSOCIATION. Other experts in the field may also propose revisions and submit comments for the Committee to consider in their meetings. *Id*.

These standards are clearly based on professional expertise and developed in accordance with a substantial process. However, they do not purport to establish a baseline of acceptable safety procedures and are not enforceable by prisoners. Rather, the ACA standards are "designed to enhance correctional practices for the benefit of inmates, staff, administrators, and the public." *About the ACA Standards*. It is no surprise then that courts have consistently cited the ACA standards in conditions of confinement cases, while never holding that they establish the floor of constitutionally acceptable conditions. *See, e.g.*, *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 376 n.3, 391 n.13 (1992) (noting that a District Court reasonably relied on the ACA standards in issuing a consent decree, but that the standards did not establish the constitutional minimum in a challenge to double-celling); *Duran v. Elrod*, 760 F.2d 756, 759 (7th Cir. 1985) (reasoning that even though the ACA standards forbids a certain condition of confinement, "the Constitution does not forbid it"); *Payette v. Hoenisch*, 284 F. App'x 348, 352 (7th Cir. 2008) (supporting precedent in a conditions of confinement case with evidence that the ACA standards adopted the same requirement). These courts defer to the ACA standards to the extent they elucidate the reality of correctional facilities, but they correctly recognize that the Constitution does not incorporate any set of professional standards.

ii. The Prison Rape Elimination Act Standards

The PREA standards were developed pursuant to the Prison Rape Elimination Act, which Congress passed in 2003 in part to "develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape." 34 U.S.C. § 30302(3). The final PREA standards are the result of a nine-year process. First, the National Prison Rape Elimination Commission researched and published a 276-page report and proposed standards; then, the Department of Justice promulgated regulations based on the Commission's proposal. Eight experts served as commissioners and more than fifty additional experts contributed to the final report. *National Prison Rape Elimination Commission Report*, NAT'L CRIMINAL JUSTICE REFERENCE SERVICE (June 2009).

Undoubtedly, the PREA standards reflect expertise and rigorous process, but Congress did not make the regulations mandatory for state, county, or city prisons. 34 U.S.C. § 30307(b). Because the standards are non-binding, compliance or non-compliance cannot be determinative of constitutionality. But a court may, of course, consider these standards when deciding whether conditions or conduct were reasonable. In *J.K.J. v. Polk County*, 960 F.3d 367 (7th Cir. 2020), the Seventh Circuit, sitting en banc, used the PREA standards in precisely this way. The en banc court made clear that "PREA is not a constitutional standard, and jails are not required to adopt it." *Id.* at 384. But in reversing the panel's decision and rejecting its reasoning, the court relied on the County's non-compliance with the PREA standards in holding that the County had been deliberately indifferent to the "obvious" danger the plaintiffs faced. *Id.* This treatment is both doctrinally and prudentially correct.

iii. Federal Agency Health Guidelines

Different forms of federal and professional guidance are developed for different purposes and subject to varying procedures. Courts necessarily consider these differences when

incorporating agency guidance into their objective reasonableness analysis. Evidence of compliance with guidelines and standards that intend to set baseline safety standards for the general public warrant significant judicial deference because the Constitution does not require correctional facilities to be safer than detainees' homes. *See Carroll v. DeTella*, 255 F.3d 470, 472–73 (7th Cir. 2001) (holding that compliance with EPA standards was enough to defeat an Eighth Amendment claim and declining "to impose upon prisons in the name of the Constitution a duty to take remedial measures against pollution or other contamination that the agencies responsible for the control of these hazards do not think require remedial measures"); *Forbes v. Edgar*, 112 F.3d 262, 267 (7th Cir. 1997) (relying on a prison's compliance with the CDC's Tuberculosis treatment guidelines for the general population in holding that the warden's conduct was not deliberately indifferent to the plaintiff's potentially serious danger). However, where the guidance is not directly related to minimum health standards, it demands less deference. *See French v. Owens*, 777 F.2d 1250, 1257–58 (7th Cir. 1985) ("The eighth amendment does not . . . require complete compliance with the numerous OSHA regulations."); *Darrah v. Krisher*, 865 F.3d 361, 369 (6th Cir. 2017) (holding that limited compliance with the Ohio Department of Medical Health treatment plan is irrelevant if the treatment is otherwise unreasonable). Courts must therefore analyze agency safety guidelines with particular attention to discern whether they rightly establish minimally requisite safety standards.

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These examples are merely illustrative and limited only by space. Indeed, courts must always evaluate these factors when deciding the deference owed to standards and guidelines in an objective reasonableness analysis. It is doctrinally and prudentially inappropriate to defer to this material if it is developed and enacted in a manner that is incompatible with the principles of the Fourteenth Amendment. That is, standards and guidelines that recommend conditions of

confinement that are objectively unreasonable, no matter their claims to expertise or rigor, cannot establish the constitutional floor. Next, we apply these principles in evaluating the degree to which the court should defer to the CDC's interim guidance for correctional facilities during the COVID-19 pandemic.

Applicant Details

First Name	**William**
Middle Initial	**H**
Last Name	**Bristow**
Citizenship Status	**U. S. Citizen**
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Contact Phone Number	**8453040367**

Applicant Education

BA/BS From	**Cornell University**
Date of BA/BS	**May 2016**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 20, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**NYU Law Moot Court Board (journal equivalent)**
Moot Court Experience	**Yes**
Moot Court Name(s)	**NYU Law Moot Court Board**

Bar Admission

Admission(s)	**New York**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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Murphy, Erin
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

May 15, 2023

The Honorable Kiyo A. Matsumoto
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Dear Judge Matsumoto:

I am a second-year associate at Debevoise & Plimpton LLP and a graduate of New York University School of Law. I am applying for a clerkship in your chambers during the 2025-2026 term or any subsequent term. Prior to law school I worked as a trial preparation assistant at the New York County District Attorney's Office, and during law school I interned at both United States Attorney's Offices in New York City.

Enclosed are my resume, law school transcript, writing sample, and letters of recommendation. My writing sample is a compassionate release motion filed on behalf of my client. I was the primary drafter, although I benefitted from both feedback and relatively light editing from senior attorneys.

My letters of recommendation are from the Honorable James Orenstein, Arbitrator and Mediator, JAMS; Nicholas Moscow, Assistant United States Attorney, United States Attorney's Office, Eastern District of New York; Erin Murphy, Professor of Law, New York University School of Law; and Troy McKenzie, Dean, New York University School of Law. I was a student in classes taught by Judge Orenstein, Professor Murphy, and Dean McKenzie. Professor Andrew Weissmann has also agreed to act as a reference. Contact information for each is below:

James Orenstein	212-607-2787 (case manager)	jorenstein@jamsadr.com
Nicholas Moscow	718-757-5462	nicholas.moscow@usdoj.gov
Erin Murphy	212-998-6672	erin.murphy@nyu.edu
Troy McKenzie	212-998-6756	troy.mckenzie@nyu.edu
Andrew Weissmann	917-575-2171	andrewweissmann@gmail.com

Respectfully,

/s/

William Bristow

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EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
J.D., *cum laude*, May 2021
Unofficial GPA: 3.71
Honors: *Robert McKay Scholar* (Top 25% of the class after four semesters)
Moot Court Board (journal equivalent), *Staff Editor and 3L Competitions Team*, New York City Bar National Moot Court Competition—National Semi-Finalist
Activities: Prosecution Legal Society, *Co-President*
Criminal Procedure, Spring 2021, Professor Andrew Weissmann, *Teaching Assistant*
2019 Sudler Family Fellow

CORNELL UNIVERSITY, Ithaca, NY
B.A. in Government & Economics, May 2016
Activities: Cornell University College Democrats, *President*
Kappa Alpha Pi Pre-Law Fraternity, *VP of Public Relations*

EXPERIENCE

DEBEVOISE & PLIMPTON LLP, New York, NY
Associate, October 2021-present; ***Summer Associate***, July 2020
Participated in all aspects of government investigations, complex commercial litigation matters, and a sensitive investigation into allegations of sexual harassment and financial impropriety at a professional sports club. Also drafted a compassionate release motion for a *pro bono* client as part of the Holloway Project, a federal compassionate release project, which resulted in the client's release.

UNITED STATES ATTORNEY'S OFFICE, SOUTHERN DISTRICT OF NEW YORK, New York, NY
Legal Intern*, *Criminal Division, January 2020-May 2020
Conducted legal research and drafted memoranda and letter briefs. Observed arraignments, status conferences, hearings, pleas, trials, and sentencings.

UNITED STATES ATTORNEY'S OFFICE, EASTERN DISTRICT OF NEW YORK, Brooklyn, NY
Legal Intern*, *Criminal Division, May 2019-August 2019
Conducted legal research and drafted memoranda, letter briefs, search warrants, and an investigatory plan. Participated in proffer meetings and investigation meetings. Observed arraignments, status conferences, hearings, pleas, trials, and sentencings. Spoke on the record during Government's application for an Order of Excludable Delay.

NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE, New York, NY
Trial Preparation Assistant*, *Trial Bureau 50, July 2016-July 2018
Drafted subpoenas and court orders for both grand jury and trial. Second-sat homicide trial. Assisted with various types of criminal investigations and participated in numerous proffer meetings. Contacted witnesses and assisted in scheduling grand jury presentations, meetings, hearings, and trials. Assigned to four or five Assistant District Attorneys at any given time. Frequently required to meet short or urgent deadlines.

ADDITIONAL INFORMATION

Enjoy cooking, reading (both fiction and non-fiction), and running. Varsity Ice Hockey at Suffern High School, Suffern, NY (2012 NYS Division 1 Ice Hockey Champions) and Club Ice Hockey at Cornell University, Ithaca, NY.

Name: **William H Bristow**
Print Date: **07/03/2021**
Student ID: **N12161308**
Institution ID: **002785**
Page: **1 of 2**

New York University
Beginning of School of Law Record

Degrees Awarded

Juris Doctor 05/19/2021
School of Law
Honors: cum laude
Major: Law

Fall 2018

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Stratos N Pahis			
Torts	LAW-LW 11275	4.0	B+
Instructor: Catherine M Sharkey			
Procedure	LAW-LW 11650	5.0	A-
Instructor: Troy A McKenzie			
Contracts	LAW-LW 11672	4.0	A-
Instructor: Clayton P Gillette			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2019

School of Law
Juris Doctor
Major: Law

Constitutional Law	LAW-LW 10598	4.0	B+
Instructor: Daryl J Levinson			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Stratos N Pahis			
Legislation and the Regulatory State	LAW-LW 10925	4.0	A
Instructor: Adam B Cox			
Criminal Law	LAW-LW 11147	4.0	B+
Instructor: Erin Murphy			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2019

School of Law
Juris Doctor
Major: Law

Conflict of Laws	LAW-LW 10701	4.0	A-
Instructor: Linda J Silberman			
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	B+
Instructor: Oscar G Chase			
Complex Federal Investigations Seminar	LAW-LW 11517	2.0	A
Instructor: James Orenstein			
Marden Competition	LAW-LW 11554	1.0	CR
Evidence	LAW-LW 11607	4.0	A
Instructor: Erin Murphy			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	43.0	43.0

Spring 2020

School of Law
Juris Doctor
Major: Law

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Due to the COVID-19 pandemic, all spring 2020 NYU School of Law (LAW-LW.) courses were graded on a mandatory CREDIT/FAIL basis.
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Complex Litigation	LAW-LW 10058	4.0	CR
Instructor: Troy A McKenzie			
Criminal Procedure Survey	LAW-LW 10436	4.0	CR
Instructor: Andrew Weissmann			
Prosecution Externship - Southern District Seminar	LAW-LW 10835	2.0	CR
Instructor: Margaret S Graham Anna M Skotko			
Prosecution Externship - Southern District	LAW-LW 11207	3.0	CR
Instructor: Margaret S Graham Anna M Skotko			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	56.0	56.0

McKay Scholar-top 25% of students in the class after four semesters

Fall 2020

School of Law
Juris Doctor
Major: Law

Intelligence Gathering and Law Enforcement: Post 9/11 Seminar - Writing Credit	LAW-LW 10516	1.0	A
Instructor: Stephen J Schulhofer			
Counterterrorism Intelligence Gathering and Law Enforcement	LAW-LW 10637	2.0	A
Instructor: Stephen J Schulhofer			
Moot Court Board	LAW-LW 11553	1.0	CR
Federal Courts and the Federal System	LAW-LW 11722	4.0	A-
Instructor: Burt Neuborne			
Property	LAW-LW 11783	4.0	A-
Instructor: William E Nelson			
Corporate Crime and Financial Misdealing: Legal and Policy Analysis Seminar	LAW-LW 12243	2.0	A
Instructor: Alicyn L Cooley			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	70.0	70.0

Spring 2021

School of Law
Juris Doctor
Major: Law

Sentencing Seminar	LAW-LW 10016	2.0	A
Instructor: Alicyn L Cooley John Gleeson			
Corporations	LAW-LW 10644	4.0	A-
Instructor: Ryan J Bubb			
Moot Court Board	LAW-LW 11553	1.0	CR
Teaching Assistant	LAW-LW 11608	2.0	CR
Instructor: Andrew Weissmann			
Presidential Powers Seminar	LAW-LW 12122	2.0	A
Instructor: Richard H Pildes Robert Bauer			
The Elements of Criminal Justice Seminar	LAW-LW 12632	2.0	A
Instructor: Preet Bharara			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	83.0	83.0

Staff Editor - Moot Court 2019-2020
NYC Bar Nationals Team - Moot Court 2020-2021
Corporate Compliance and Enforcement Prize

Name:	**William H Bristow**
Print Date:	**07/03/2021**
Student ID:	**N12161308**
Institution ID:	**002785**
Page:	**2 of 2**

National Moot Court Competition Award

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

The following guidelines, adopted in Fall 2008, represent NYU School of Law's current guidelines for the distribution of grades in a single course. Note that JD and LLM students take classes together and the entire class is graded on the same scale.

A+ = 0-2%	**A** = 7-13%	**A-** = 16-24%
B+ = 22-30%	**B** = Remainder	**B-** = 4-8% for 1L JD students; 4-11% for all other students
C/D/F = 0-5%	**CR** = Credit	**IP** = In Progress
EXC = Excused	**FAB** = Fail/Absence	**FX** = Failure for cheating
*** = Grade not yet submitted by faculty member		
Maximum for A tier = 31%; Maximum grades above B = 57%		

The guidelines for first-year JD courses are mandatory and binding on faculty members. In all other cases, they are advisory but strongly encouraged. These guidelines do not apply to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students taking the course for a letter grade.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

***Florence Allen Scholar**:*	Top 10% of the class after four semesters
***Robert McKay Scholar**:*	Top 25% of the class after four semesters
***Pomeroy Scholar**:*	Top ten students in the class after two semesters
***Butler Scholar**:*	Top ten students in the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, or to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students that have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process for all NYU School of Law students is highly selective and seeks to enroll men and women of exceptional ability. The Committee on Admissions selects those candidates it considers to have the very strongest combination of qualifications and the very greatest potential to contribute to the NYU School of Law community and the legal profession. The Committee bases its decisions on intellectual potential, academic achievement, character, community involvement, and work experience. For the Class entering in Fall 2018 (the most recent entering class) the 75th/25th percentiles for LSAT and GPA were 172/167 and 3.9/3.6. Because of the breadth of the backgrounds of LLM students and the fact that foreign-trained LLM students do not take the LSAT, their admission is based on their prior legal academic performance together with the other criteria described above.

Updated: 01/15/2019

ZwillGen

1900 M Street NW, Suite 250
Washington, DC 20036

Phone: (202) 296-3585
Website: www.zwillgen.com

January 25, 2021

RE: William "Billy" Bristow, NYU Law '21

Dear Judge Brodie:

William Bristow has asked me to write a letter in support of his application to serve as your law clerk, and I am delighted to do so. Billy was a student in my "Complex Federal Investigations" seminar in the fall of 2019 and earned a grade of A.

My seminar is a challenging one: the assigned readings – mostly unedited cases, statutes, policy statements, and other primary source materials – are voluminous, and I don't tease out in advance of classroom discussions what the students should focus on. Instead, over the course of the semester I expect the students to learn to assimilate information and think like lawyers who investigate, prosecute, and defend crimes committed by organized groups. Classroom discussions focus on the ways the authorities we read shape the incentives and behaviors of all the players in the criminal justice system. The final exam confronts the student with the hypothetical facts of a single long-term investigation and asks the student to make and explain strategic choices for the prosecutor and the investigative subjects.

A member of the seminar who learns merely to cite the case or statute that stands for a particular rule we have studied cannot achieve the success Billy did. Instead, it requires the ability to independently analyze large amounts of information and synthesize it to form a sensible response, it requires excellent writing ability, and it requires strong time management skills. The fact that Billy was so successful in my seminar – and his final exam was an outstanding display both of his comprehension of the syllabus and his ability to convey that understanding – suggests that he possesses many of the same qualities I seek when hiring my own law clerks.

I also encourage substantive classroom discussion in my seminar, and Billy impressed me with his frequent, insightful contributions. Unlike some students who spoke often to earn credit for classroom participation without contributing much of substance, Billy only spoke when he had a useful contribution to make. Fortunately, I could count on those contributions to occur on a regular basis, and they consistently made clear that Billy had mastered the assigned reading and was thinking carefully about it. I valued his contributions to our classroom discussions, and not only for their substance. Billy always made it clear that he was engaged and interested in our discussions, and in the larger project of understanding our criminal justice system from a variety of perspectives.

Finally, while my interactions with Billy have been few outside our work together in my seminar this year, his resume and our discussions about his career goals bolster the impression he made on me. Billy is a young lawyer who is eager to understand and engage with the legal system and to have a positive impact on our society. As his educational and professional experiences make clear, his ambition is to serve the public as a federal prosecutor, and I am confident he will be a very good one. But first, like all of the best clerkship candidates (and I interviewed many over sixteen years as a magistrate judge in the Eastern District of New York), he is looking for a clerkship that will provide not simply an opportunity to serve the court for a year or two, but just as importantly to work with a mentor who will help him become the terrific lawyer he hopes to be. I expect that you will find Billy will be an excellent law clerk.

Please do not hesitate to contact me if I can provide further information, and best of luck in selecting your law clerks.

Very truly yours,

/s/ *James Orenstein*

James Orenstein

Erin E. Murphy
Norman Dorsen Professor of Civil Liberties
New York University School of Law
40 Washington Square South, Room 419
(212) 998-6672
erin.murphy@nyu.edu

May 15, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

It is with great enthusiasm that I write to recommend Billy Bristow for a clerkship in your chambers. Billy was a hard-working, intellectually curious, and public service-minded student who would make an exceptional law clerk.

I first met Billy in his first year of law school, when he was one of roughly 90 students in my criminal law class. Billy was an engaged and active participant in our class discussions. Having worked for two years in the office of the Manhattan District Attorney prior to coming to law school, Billy was able to offer the class his valuable insights into how the criminal justice system operated on the ground. He was also a frequent attendee of my office hours, and I always enjoyed chatting with him about a doctrinal point or discussing careers in criminal justice.

The following year, Billy enrolled in my course in evidence, where he continued to shine. That class focuses on the Federal Rules of Evidence, and the exam is a multiple-choice, time-pressured assessment with questions akin to those found on the Bar. I was not at all surprised when I saw that Billy aced the exam, earning one of only a dozen of A grades.

Billy's academic engagement is exemplified by his participation in the Moot Court Board. As a member of the team competing in the Kaufman Securities Law Competition, Billy helped to draft an appellate brief and participated in numerous moots of oral arguments. Unfortunately, the Covid-19 pandemic led to the cancellation of the ultimate competition, but I am confident that Billy would have excelled in that event, as he has in his coursework.

As a native New Yorker interested in a career in prosecution, Billy has decided to limit his search to New York's district courts. I am certain that his practical experience, raw smarts, and hard-working disposition will be an asset in chambers, as will his easy-going personality. I highly commend his application to your consideration.

Sincerely,

Erin E. Murphy
Professor of Law

New York University
A private university in the public service

School of Law
Faculty of Law

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Troy A. McKenzie
Dean
Cecelia Goetz Professor of Law

May 15, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Re: William Bristow, NYU Law '21

Dear Judge Matsumoto:

William Bristow, one of my former students, has asked me to write a letter of reference for his application to serve as a law clerk in your chambers. I am happy to do so.

Billy was a student in my first year Civil Procedure class and in my Complex Litigation class. In Civil Procedure, he was an active and welcome presence in the class. Civil Procedure can be baffling to first year students, because mastery of the subject matter requires a grasp of doctrine, strategy, and institutional considerations that go beyond any one area of substantive law. Billy was completely comfortable across the full range of the course. He was careful and perceptive in class discussions. His day to day performance was matched by his final examination, which landed in the top rank among a class of 85 students. He earned a well deserved "A " for the semester.

I suspect that Billy's post college work experience helps to explain his easy transition to law school. He was a trial assistant in the Manhattan District Attorney's Office for two years, and he obviously learned a great deal about the realities of litigation from that time. Since coming to law school, his interest in the "real world" of law—and in criminal law in particular—has deepened. He worked as an extern at the U.S. Attorney's office (S.D.N.Y.), joined the Moot Court Board, and focused his course work on classes that will serve him well in a future career as a litigator.

I taught him in one of those classes—Complex Litigation, which is our advanced civil procedure class. The course covers class actions, the Multidistrict Litigation Act, and the problems of aggregation of claims and parties generally. It is an intense course due to the difficult material and the high caliber of students who typically enroll. As I expected, based on his performance in Civil Procedure, Billy was an active participant in the class, even when we had to move to online instruction in the middle of the semester due to the COVID 19 outbreak. Although NYU shifted to a mandatory pass/fail grading policy for the semester, Billy's final examination was in keeping with his in class performance and would have earned a top grade for the semester in any other year.

I should add a final word about Billy. He is an even keeled person with a fine sense of humor, but he is serious about his professional goals. Of all my students over the last few years, he is the one I am most certain I will read about some day as a prosecutor in a prominent case. And I am just as confident that he will be an incredibly good one. He comes to you with my enthusiastic recommendation.

Respectfully,

Troy A. McKenzie

May 15, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write to recommend William Bristow for a clerkship in your chambers. I recommend Billy enthusiastically, with confidence that his talents and helpful and cheerful demeanor would make him an asset anywhere.

I am an Assistant United States Attorney in the Eastern District of New York. Billy interned for our office in the summer of 2019; he was assigned to assist me in the Organized Crime and Gangs section. It was immediately clear that Billy would be a talented intern, capable of handling investigative tasks far more advanced than typical interns.

Billy's help was instrumental in a number of cases. Once I had worked with Billy, I trusted him far more than a typical intern. I gave him an entire cold case murder file and asked him to draft an investigative plan. Billy digested the old materials perfectly and came out with a thoughtful, detail-oriented and well considered plan to pursue. The investigation is ongoing, along a trajectory that would be very familiar to Billy.

Billy also assisted in responding to a complicated habeas corpus application, filed by a convicted triple murderer. The response that Billy drafted addressed the merits of the petitioner’s arguments as well as the complex procedural bars imposed by the Antiterrorism and Effective Death Penalty Act.

In addition to the difficult assignments that he handled with aplomb, Billy was a joy to have in the office. Although assigned to assist me, he was well known and liked by the other interns and the other assistants in the office. He was always eager to assist and he was a pleasant presence in the office.

In all, Billy’s demeanor, his ability and his personality will make him a terrific addition to chambers. I am confident that Billy will be a very good law clerk and will be applying to United States Attorneys Offices in relatively short order.

Very truly yours,

Nicholas J. Moscow
Assistant U.S. Attorney
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Writing Sample - Compassionate Release Motion

Drafted and Filed Fall 2022

The attached is a 14-page motion filed in the District of Colorado on behalf of a *pro bono* client who sought a sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i). The motion argues our client's sentence should be be reduced to time-served because of several "extraordinary and compelling" circumstances, including the client's declining health, the disparity between the sentence he received and the sentence he would likely have received today, and the disparity between his sentence and his co-defendant's sentences.

As explained by the motion, the government did not oppose relief in this case. The motion was granted soon after it was filed.

The motion has been redacted to omit both the client's name and the names of others, as well as certain identifying information. The motion also omits the table of authorities.

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

UNITED STATES OF AMERICA	:	**Criminal No. 96-cr-[redacted]**
– against –	:	
Client [redacted],	:	**Motion to Reduce Sentence Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i)**
Defendant.	:	**Oral Argument Requested**

DEFENDANT'S BRIEF IN SUPPORT OF UNOPPOSED MOTION TO REDUCE SENTENCE PURSUANT TO 18 U.S.C. § 3582(c)(1)(A)(i)

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Defendant Client respectfully submits this unopposed motion pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) for a sentence reduction to time served based on the "extraordinary and compelling reasons" discussed below. Counsel has conferred with the government; the government has represented that it does not object to, and will not oppose, this motion.

In 2020, in response to a motion seeking the same relief, the government agreed that extraordinary and compelling reasons warranted a reduction in sentence. So did the Court, but in an order dated , 2020, it also agreed with the government that the circumstances did not warrant release *at that* time, and encouraged a renewed motion after Client had "served about 27 years in custody." That time has arrived; as of November 20 of this year, Client will have served 26 and one-half years in prison on this case—the equivalent, considering good time, of a sentence of almost 32 years. As the Court knows, Client is 66 years old, in seriously bad health, and has been an exemplary inmate, serving children and the underprivileged and setting a good example for his fellow inmates. Client respectfully submits he has earned a reduction of his life sentence to time served.

After the Court denied Client's prior motion, the Tenth Circuit made it clear that district courts have the authority to reduce the sentences of defendants like Client, and to "determine for themselves what constitutes 'extraordinary and compelling reasons'" under § 3582(c)(1)(A)(i). *United States v. Maumau*, 993 F.3d 821, 832 (10th Cir. 2021). The Court further held that severe sentences imposed pursuant to § 924(c) convictions may properly constitute an extraordinary and compelling reason to reduce a sentence. *Id.* at 837. Nine other courts of appeals have similarly upheld district courts' authority to grant relief on factors other

than age, medical conditions, and family circumstances.[1] Client therefore once again asks this Court to revisit the sentence imposed by the late Honorable Trial Judge and return Client to his family.

Client's current life sentence stems from his participation in a drug conspiracy that spanned several months in 1996. No one was physically harmed. Still, Trial Judge was *required* by law to sentence Client to life in prison. This Court need not countenance such a manifestly unjust result, and should now exercise the discretion afforded to it by the First Step Act to revisit Client's sentence and impose a sentence of time served.

FACTUAL BACKGROUND

Client is a 66-year-old husband, grandfather, and Vietnam War veteran. He was honorably discharged from the Army in 1976. In the early 1990s, he was introduced to methamphetamine and quickly became addicted. Fueled by his addiction, Client reached his lowest point and participated in a conspiracy to move methamphetamine and cocaine from California to Colorado, in exchange for money and weapons. Client elected to exercise his right to a jury trial and was convicted of multiple counts, including two convictions under 18 U.S.C. § 924(c)(1), stemming from two specific transactions during which no violence occurred and no one was hurt.[2] Under the then-mandatory sentencing guidelines, Client was

[1] *See United States v. Ruvalcaba*, 26 F 4th 14, 28 (1st Cir. 2022); *United States v. Andrews*, 12 F.4th 255, 259 (3d Cir. 2021); *United States v. Long*, 997 F.3d 342, 355–56 (D.C. Cir. 2021); *United States v. Shkambi*, 993 F.3d 388, 391–93 (5th Cir. 2021); *United States v. Aruda*, 993 F.3d 797, 802 (9th Cir. 2021) (per curiam); *United States v. McCoy*, 981 F.3d 271, 284–86 (4th Cir. 2020); *United States v. Jones*, 980 F.3d 1098, 1108 (6th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020); *United States v. Brooker*, 976 F.3d 228, 235–36 (2d Cir. 2020). *But see United States v. Bryant*, 996 F.3d 1243, 1262 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 583 (Dec. 6, 2021).

[2] These were: Counts One (conspiracy to distribute and possess with intent to distribute methamphetamine and cocaine, in violation of 21 U.S.C. §§ 846, 841(b)(1)(A)); Two (possession with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841(b)(1)(A)); Three (using or carrying a firearm during and in relation to the crime charged in Count Two, in violation of 18 U.S.C. § 924(c)); Nine (attempted possession with

sentenced to 293 months on the drug counts. He also received a mandatory, consecutive sentence of 30 years for Count Three, the first § 924(c), because the jury found the relevant firearm was a machine gun. Finally, because the Court found the firearms in Count Ten were pipe bombs, Client was sentenced to a mandatory, consecutive life sentence for his second § 924(c) conviction. Sentencing Tr. at 29.

As mentioned above, Client has served almost 26 and one-half years of his life sentence, more than double the sentence former AUSA thought was necessary to appropriately punish him and protect the community; the government "offered Mr. Client a plea deal of 12 years." *See* Ex. A, AUSA Affidavit.[3] And today Mr. AUSA believes Client "has done enough time" and that "his life sentence is now far greater than necessary to achieve the ends of justice in this case." *Id*. Meanwhile, most of Client's codefendants, who pled guilty, were released years ago. *See infra* p. 8.

Client is not the same man today as he was in 1996. His significant rehabilitation has been recognized by this Court, the prosecutor in his case, and his BOP counselor, among others. Moreover, as Client has aged, his health has declined.

ARGUMENT

This Court has the authority to reduce Client's sentence based on the extraordinary and compelling circumstances presented by his case. The changes to 18 U.S.C.

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intent to distribute methamphetamine and cocaine, in violation of 21 U.S.C. § 841(b)(1)(A)); and Ten (using or carrying a firearm during and in relation to the crime charged in Count Nine, in violation of 18 U.S.C. § 924(c)). (ECF No. at 1.)

[3] Mr. AUSA swore the attached declaration in May 2021 in support of a clemency petition for Mr. Client. Mr. AUSA wrote that he "submit[s] this declaration in full support of Mr. Client's release from confinement. I urge the Office of the Pardon Attorney and the President to grant his request for a commutation of his life sentence to time served with supervised release to follow." Counsel has no reason to believe that the statements set forth in Mr. AUSA's May 2021 declaration have changed.

§ 3582(c)(1)(A)(i) made by the First Step Act allow inmates serving excessive sentences to seek sentence reductions from their sentencing courts—even without the support of the BOP. The circumstances here warrant such relief, and the factors a court must consider in determining an appropriate sentence weigh strongly in favor of a reduction in sentence to time served.

A. The Court Has the Authority to Grant Client's Motion

What has become known as the compassionate release statute was first enacted as part of the Comprehensive Crime Control Act of 1984. Pub. L. No. 98-473, 98 Stat 1837. It provided that a district court could reduce a term of imprisonment in limited circumstances, one of which was the presence of "extraordinary and compelling reasons" warranting the reduction, as determined by the sentencing court. *See* 18 U.S.C. § 3582(c)(1)(A)(i), *amended by* First Step Act of 2018, Pub. L. No. 115-391, § 603, 132 Stat. 5194. Although the courts were given this authority nearly four decades ago, the statute imposed a gatekeeper—this authority could be invoked only upon a motion by the BOP. *See id*. Without such a motion, sentencing courts were powerless to reduce a sentence, even if they agreed with a defendant that extraordinary and compelling reasons warranted such relief.

This regime changed in December 2018, when the First Step Act amended § 3582(c)(1)(A). *See* First Step Act § 603. Under the amended statute, a court can now reduce a sentence for "extraordinary and compelling reasons" upon a defendant's motion if he exhausts his administrative rights to appeal after BOP refuses to bring a motion or 30 days pass from the receipt of such a request by the warden of the defendant's facility, whichever is earlier.[4] Because

[4] 18 U.S.C. § 3582(c)(1)(A); *see also Maumau*, 993 F.3d at 830–31 ("Section 603(b) of the First Step Act . . . modified § 3582(c)(1) to allow a defendant to directly file a motion for compassionate release with the district court

the warden denied Client's request on June 9, 2022, Client has exhausted his administrative remedies and is entitled under § 3582(c)(1)(A) to bring his motion directly to this Court, which, as discussed below, has the authority to reduce his sentence.

B. This Court Should Grant Client's Requested Relief

1. *Federal Sentencing Courts Have Broad Discretion to Determine on a Case-By-Case Basis Whether "Extraordinary and Compelling Reasons" Warrant a Sentence Reduction*

The Tenth Circuit has held that § 1B1.13 does not apply to motions made by inmates (as opposed to those made by the BOP). *See United States v. McGee*, 992 F.3d 1035, 1045–51 (10th Cir. 2021); *Maumau*, 993 F.3d at 832–38. Thus, as the Fourth Circuit explained in *McCoy*, "district courts are 'empowered . . . to consider *any* extraordinary and compelling reason for release that a defendant might raise.'" 981 F.3d at 284 (citation omitted). Finally, the Supreme Court recently reaffirmed this Court's "broad discretion to consider all relevant information" in "proceedings that may modify an original sentence[,]" explaining that that discretion "is bounded only when Congress or the Constitution expressly limits the type of information a district court may consider in modifying a sentence." *Concepcion v. United States*, 142 S. Ct. 2389, 2398 (2022). In short, by affirming a sentence reduction for a defendant seeking compassionate release under § 3582(c)(1)(A), *Maumau* established that this Court has the legal authority to grant the relief Client seeks here. *See Maumau*, 993 F.3d at 837.

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after either exhausting administrative rights to appeal the Director of the BOP's failure to file such a motion, or the passage of 30 days from the defendant's unanswered request to the warden for such relief.").

2. *Extraordinary and Compelling Circumstances Warrant a Reduction in* Client *'s Sentence*

i. The Circumstances this Court Previously Found Remain Unchanged

As this Court previously found, and the government conceded, Client 's declining health is an extraordinary and compelling circumstance.[5] He suffers from diabetes, chronic obstructive pulmonary disease, hyperlipidemia, and hypertension. In light of the risk of death or serious illness that Covid-19 and its numerous, unpredictable variants continue to present for older persons with serious ailments—like Client —these circumstances are even more compelling today as Client has continued to age.[6] These risks endure despite the fact that Client is fully vaccinated.[7]

In addition, Client continues to be the exemplary inmate this Court found him to be two and one-half years ago. Undersigned counsel represent more than 75 inmates subjected to the lengthy sentences meted out under the since-amended regime established by 18 U.S.C. § 924(c). It is rare indeed to see men subjected to such sentences (here, life in prison) with literally no disciplinary infractions. It is also rare to see such remarkable records of personal rehabilitation.

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[5] Client , 2020 WL [redacted], at *2 ("Thus, as the Government straightforwardly puts it, 'This case therefore boils down to whether the § 3553(a) factors weigh in favor of his release and whether or not he still poses a significant danger to the safety of the community.'"); *see also United States v. Davis*, No. 1:02-CR-552 (LMB), 2021 WL 1651226, at *2-3 (E.D. Va. Apr. 27, 2021) (reducing a sentence of roughly 63.5 years to time-served, of which the defendant served roughly 18.5 years, "find[ing] . . . the disproportionate length of defendant's stacked sentences, in combination with his serious medical conditions, [were] extraordinary and compelling reasons").

[6] *See* Centers for Disease Control, People with Certain Medical Conditions (updated Oct. 19, 2022), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html.

[7] *United States v. Spriggs*, No. 1:10-cr-00364-WDQ, 2021 WL 1856667 (D. Md. May 10, 2021) (granting relief where defendant's "vaccination status [did] not greatly decrease the court's concern that his medical conditions increase[d] his risk of severe illness due to COVID-19"); *United States v. White*, No. 3:17-cr-00104-2, 2021 WL 268719, at *4 (M.D. Tenn. Jan. 27, 2021) (granting relief and noting that [recent] variants . . . were identified that may (or may not) allow the virus to spread more quickly, lead to "more severe or less severe illness," and "evade vaccine-induced immunity").

ii. Additional Extraordinary and Compelling Circumstances Exist

What are now considered excessively harsh sentences resulting from § 924(c) charges have been held by courts around the country to constitute extraordinary and compelling circumstances warranting sentence reductions. The Tenth Circuit has affirmed a finding of "extraordinary and compelling reasons" based on a "combination of factors," including the defendant's "'young age at the time of' sentencing; the 'incredible' length of his mandatory sentences under § 924(c); the First Step Act's elimination of sentence-stacking under § 924(c) and the fact that [the defendant], 'if sentenced today, . . . would not be subject to such a long term of imprisonment.'" *Maumau*, 993 F.3d at 837.

District courts within this district and circuit have granted sentence reductions for defendants based on the same sentencing regime Client faced,[8] as have over one hundred

[8] *United States v. Payne*, No. 94-CR-150, 2022 WL 2257044 (N.D. Okla. June 23, 2022); *United States v. Watson*, No. 04-CR-182-TCK-02, 2022 WL 1125801 (N.D. Okla. Apr. 15, 2022); *United States v. Tuakalau*, No. 2:08-cr-00431, 2022 WL 1091334 (D. Utah Apr. 12, 2022); *United States v. Rivas*, No. 2:00-CR-605, 2022 WL 974088 (D. Utah Mar. 31, 2022); *United States v. Gregory*, No. 07-CR-73-JED, 2021 WL 5450692 (N.D. Okla. Nov. 22, 2021); *United States v. Madrid*, No. CR 03-847 KG, 2021 WL 3710767 (D.N.M. Aug. 20, 2021); *United States v. Merriweather*, No. 02-40130-JAR-1, 2021 WL 3488407 (D. Kan. Aug. 9, 2021); *United States v. Steele*, No. 10-20037-01-JWL, 2021 WL 2711176 (D. Kan. July 7, 2021); *United States v. Shobe*, No. 4:11-cr-00149, ECF No. 376 (N.D. Okla. June 24, 2021); *United States v. Malone*, No. 99-CR-12-TCK, 2021 WL 2371605 (N.D. Okla. June 9, 2021); *United States v. Foreman*, No. 02-CR-135-TCK, 2021 WL 2143819 (N.D. Okla. May 26, 2021); *United States v. Love*, No. 99-CR-12-TCK, 2021 WL 2025910 (N.D. Okla. May 21, 2021); *United States v. Banks*, No. 06-CR-61-TCK, 2021 WL 1941775 (N.D. Okla. May 14, 2021); *United States v. Evans*, No. 2:01-CR-603-DAK, 2021 WL 1929798 (D. Utah May 13, 2021); *United States v. Harrison*, No. 2:07-CR-53-DAK, 2021 WL 1873988 (D. Utah May 10, 2021); *United States v. LaFlora*, No. 03-10230-JTM, 2021 WL 1597948 (D. Kan. Apr. 23, 2021); *United States v. Hicks*, No. 98-CR-06-TCK, 2021 WL 1554326 (N.D. Okla. Apr. 20, 2021); *United States v. Nafkha*, No. 2:95-CR-00220-001-TC, 2021 WL 83268 (D. Utah Jan. 11, 2021); *United States v. Harris*, No. 96-40082-01-SAC, 2020 WL 7396917 (D. Kan. Dec. 17, 2020);*United States v. Curtis*, No. 01-CR-03-TCK, 2020 WL 6484185 (N.D. Okla. Nov. 4, 2020); *United States v. Turner*, No. 99-10023-04-JTM, 2020 WL 5016880 (D. Kan. Aug. 25, 2020); *United States v. Franklin*, No. 03-10151-1-JTM, 2020 WL 4736862 (D. Kan. Aug. 14, 2020); *United States v. Morris*, No. 99-10086-03-JTM, 2020 WL 4731970 (D. Kan. Aug. 14, 2020); *United States v. Pham*, No. 99-10110-2-JTM, 2020 WL 4735266 (D. Kan. Aug. 14, 2020); *United States v. Toles*, No. 99-10086-02-JTM, 2020 WL 4530481 (D. Kan. Aug. 6, 2020); *United States v. Stewart*, No. 98-40097-01-SAC, 2020 WL 4260637 (D. Kan. July 24, 2020); *United States v. Graham*, No. 99-10023-01-JTM, 2020 WL 4344840 (D. Kan. July 20, 2020); *United States v. O'Bryan*, No. 96-10076-03-JTM, 2020 WL 869475 (D. Kan. Feb. 21, 2020); *United States v. Maumau*, No. 2:08-cr-00758-TC-11, 2020 WL 806121 (D. Utah Feb. 18, 2020).

district courts around the country. Ex. B, Case Law Appendix. In March, Judge David Ebel granted a sentence reduction in circumstances similar to Client's, holding "the significant changes to . . . § 924(c)(1)(A) combined with [the defendant's] extraordinary rehabilitation . . . [are] 'extraordinary and compelling reasons.'" *United States v. Hunt*, No. 06-cr-00155 (DME), ECF No. 479, at 5-6 (D. Colo. Mar. 16, 2022).[9] That month, Judge Lewis T. Babcock, also granted relief based on the First Step Act's changes to § 924(c) sentencing. *See United States v. Salvador*, No. 06-cr-00032-LTB, 2022 WL 714302, at *4 (D. Colo. Mar. 9, 2022). Numerous district courts have afforded similar relief based on disparities caused by other sentencing changes.[10]

Client's life sentence was mandated by his § 924(c) convictions. His sentence is substantially more severe than the average federal sentence imposed today for murder.[11] If

[9] Judge Ebel was sitting as a district court judge.

[10] *See e.g.*, *United States v. Hudec*, No. CR 4:91-1-1, 2022 WL 2118974, at *4 (S.D. Tex. June 9, 2022) (finding "an extraordinary and compelling reason for granting relief" based in part on "the disparity between the sentence Defendant received and the sentence he would receive today"); *United States v. Wells*, No. 2:14-cr-00280-JCM-GWF, 2022 WL 1720987, at *3 (D. Nev. May 27, 2022) (finding Congress has "empower[ed] courts" to "consider[]factors such as intervening developments affecting mandatory minimums."); *United States v. Cleveland*, No. 3:13-CR-479-K-1, 2022 WL 562829, at *3 (N.D. Tex. Feb. 23, 2022) (reducing the defendant's sentence in part based on "the disparity between his original sentence and the sentence he would receive today after the First Step Act"); *United States v. Kratsas*, No. DKC 92-0208, 2021 WL 242501, at *4 (D. Md. Jan. 25, 2021) (holding the defendant had presented extraordinary and compelling circumstances where he would be much less likely today to receive a life sentence, which was previously mandatory); *United States v. Linton*, No. JKB-982-258, ECF No. 471 at 7–8 (D. Md. Sept. 27, 2021) (holding the "gross disparity" between the defendant's sentence and "the sentence he would receive under present circumstances" due to more lenient prosecutorial charging and judicial sentencing practices presented an extraordinary and compelling circumstance); *United States v. Hebert*, No. 1:96-CR-41-TH-1, 2021 WL 5918009, at *5 (E.D. Tex. Dec. 8, 2021) (finding changes to § 924(c) "extraordinary and compelling" where the defendant had "[r]ealistically" received the equivalent of "at least three life sentences").

[11] *See United States v. Lee*, 2021 WL 3129243, at *6 n.7 (E.D. La. July 23, 2021) (recognizing the average sentence in federal courts for murder in 2020 was 255 months nationally and reducing the defendant's 684-month § 924(c) sentences); *see also Wells*, 2022 WL 1720987, at *5-6 (considering the defendant's sentence was "five times longer than the average sentence for murder and decades longer than the average sentences for kidnapping, manslaughter, and other serious crimes" and reducing it from roughly 107 years to 10 years); *United States v. McDonel*, No. 07-20189, 2021 WL 120935, at *4 (E.D. Mich. Jan. 13, 2021) (noting that defendant's sentence was "particularly disproportionate when compared to average federal sentences for similar or more serious crimes: robbery [109 months]; firearms [50 months]; [and] murder [255 months]").

Client were sentenced today, he would face a mandatory sentence of only 35 years on the § 924(c) convictions.[12]

Client has served almost 26 and one-half years of his life sentence. As evidenced by the government's 12-year offer and by the sentences imposed on his co-defendants,[13] the time he has already served (the equivalent of an almost 32-year sentence) far exceeds what was necessary to appropriately punish him and to protect the community. *United States v. Harris*, No. 1:95-CR-05222-JLT, 2022 WL 1460054, at *6 (E.D. Cal. May 9, 2022) (finding that the "government cannot convincingly argue public safety concerns" based solely on the offense conduct when it had previously offered a plea deal that would have resulted in less time); *see also United States v. Marks*, 455 F. Supp. 3d 17, 37 (W.D.N.Y. 2020) (finding the government's prior willingness to consider a 20-year plea deal undercut any present argument that a defendant is too dangerous to be released before the end of a much longer sentence). The disparity between the sentences Client 's codefendants received and the life sentence imposed on Client after he exercised his constitutional right to trial is an "extraordinary and compelling" circumstance. *See Salvador*, 2022 WL 714302, at *4 (finding "the most persuasive factor

[12] Because the Court found by a preponderance of the evidence that the firearms at issue were pipe bombs, Client was sentenced on Count Ten to a mandatory sentence of life imprisonment. Sentencing Tr. at 29. However, the jury did not make this finding, *see* Ex. C, Verdict Forms at 11, and thus the life sentence would be unconstitutional if imposed today. *See Alleyne v. United States*, 570 U.S. 99, 103 (2013). Today, Client would be subject only to § 924(c)'s ordinary minimum sentence of five years on Count Ten, consecutive to any other sentences imposed. As for the non-924(c) counts, the Supreme Court has since made it clear that the Court would be permitted to sentence Client to just a single day in prison if he were being sentenced for the first time today. *See Dean v. United States*, 137 S. Ct. 1170, 1177 (2017) (holding "[n]othing in [the] language" of § 924(c) "prevents a district court from imposing . . . a one-day sentence for the predicate violent or drug trafficking crime").

[13] *See* Ex. D, Trial Counsel Affidavit. Codefendant A, who built the pipe bombs, was sentenced to 2.5 years. Codefendant A Judgment at 2 (ECF No. [redacted]). Codefendant B, who made an "arrangement" with Codefendant A "for the construction and delivery of pipe bombs," was sentenced to approximately 12.5 years. Codefendant A Plea Tr. at 13; Codefendant B Sentencing Minutes at 1 (ECF No. [redacted]).

supporting extraordinary and compelling reasons for a sentence reduction [was] the length of Mr. Salvador's sentence compared to the sentence received by his co-defendant").[14]

iii. This Court Is Not Constrained by Mandatory Minimums

There are no constraints on the degree of reductions district courts are empowered to grant under § 3582(c)(1)(A). In reducing Client's sentence, the Court is not bound by *any* mandatory minimum provisions, whether they were applicable at the time of sentencing or would be applicable if the defendant were being sentenced for the first time at the time of the reduction. *See* § 3582(c)(1)(A). In *Maumau*, the government explicitly agreed with that proposition, and the defendant was resentenced to time served, or approximately 10 years, although he would have faced a mandatory sentence of 15 years under the amended § 924(c). *United States v. Maumau*, No. 08-CR-00758-TC-11, ECF No. 1760 (D. Utah May 11, 2020). Recently, another court within the Tenth Circuit similarly resentenced a defendant to time served, approximately 17.5 years, although he would have faced a mandatory sentence of 42 years if he were being sentenced for the first time. *United States v. Watson*, No. 04-CR-182-TCK-02, 2022 WL 1125801, at *2, 4 (N.D. Okla. Apr. 15, 2022). Numerous courts across the country have likewise found a reduction in sentence below a currently applicable mandatory minimum warranted, often to time-served.[15] We respectfully submit that a reduction below the current mandatory minimum would better serve the ends of justice here.

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[14] Another extraordinary and compelling circumstance is that Client's jury was not properly instructed that the government was required to prove that he had "advance knowledge of a firearm's presence." *Rosemond v. United States*, 572 U.S. 65, 81 (2014).

[15] *See Wells*, 2022 WL 1720987 at *6 (reducing the defendant's sentence "below . . . the mandatory minimum of 35 years if he were sentenced today" in consideration of "the fact that [he had] already served nearly eight years with the prospect of 'dying in prison' for a crime undeserving of a life sentence"); *United States v. Harris*, No. 1:95-CR-05111-JLT, 2022 WL 1460054, at *1, 4, 10 (E.D. Cal. May 9, 2022) (reducing the defendant's sentence from roughly to 95 years to time-served, "more than 27 years," despite the current mandatory minimum of approximately

C. The Criteria for Reassessing the Length of Client's Sentence Weigh Strongly in Favor of a Sentence Reduction

When deciding a motion for relief under 18 U.S.C. § 3582(c)(1)(A)(i), a court must consider other factors as well, including the defendant's rehabilitation, his history and characteristics, and other factors that bear on who the defendant is today. *See* U.S.S.G. § 1B1.13 (requiring consideration of, *inter alia*, the factors set forth in 18 U.S.C. § 3553(a)). As set forth below, these factors further establish the sort of "extraordinary and compelling reasons" that warrant a reduction of Client's sentence.

1. *The Relevant § 3553(a) Factors Weigh Strongly in Favor of Relief*

Client's remarkable personal rehabilitation strongly weighs in favor of a reduced sentence, particularly given that his conduct post-sentencing "provides the most up-to-date picture of his 'history and characteristics.'" *Pepper v. United States*, 562 U.S. 476, 492 (2011).[16]

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45 years); *United States v. Herrera-Genao,* No. CR 07-454, 2021 WL 2451820 (D.N.J. June 16, 2021) (resentencing defendant to an overall term of 22 years although the mandatory minimum sentence he would have faced today on § 924(c) charges was 42 years); *United States v. McDonel*, No. 07-20189, 2021 WL 120935, at *6 (E.D. Mich. Jan. 13, 2021) (resentencing defendant to an overall term of 20 years although the mandatory minimum sentence he would have faced today on § 924(c) charges was 35 years); *United States v. Young*, No. 00-CR-00002-1, ECF No.109 (M.D. Tenn. May 1, 2020) (reducing sentence to time-served, or about 20 years, when the mandatory sentence would be at least 25 years today); *U.S.A. v. Defendant(s)*, No. 2:99-CR-00257-CAS–3, 2020 WL 1864906, at *7 (C.D. Cal. Apr. 13, 2020) (reducing sentence to about 20 years and 3 months when the mandatory sentence would be at least 28 years today); *United States v. Brown*, 457 F. Supp. 3d 691, 705 (S.D. Iowa 2020) (reducing sentence to time-served, or about 14 years, when the mandatory sentence would be about 22.5 years under today's law); *United States v. Clausen*, No. 00-291-2, 2020 WL 4601247, at *3 (E.D. Pa. Aug. 10, 2020) (reducing sentence to time-served, or about 20 years, despite the mandatory sentence being 53 years under today's law); *United States v. Woods*, No. 5:03-cr-30054, 2021 WL 1572562, at *5 (W.D. Va. Apr. 21, 2021) (reducing sentence to 25 years despite four § 924(c)s).

[16] *See e.g.*, *Hebert*, 2021 WL 5918009, at *8 (considering the defendant's significant rehabilitation, noting he "did not sit idly by to await the final moments of his life sentence" but instead "took [a] metaphorical leap of faith into the expansive ocean and grasped his float"); *United States v. Jones*, No. 4:06-cr-00278, 2021 WL 1156631, at *4 (S.D. Iowa Mar. 25, 2021) (noting the defendant's rehabilitation, which included a perfect disciplinary record and participation in "extensive programming [such as a] rigorous [drug abuse] program," was "nothing short of extraordinary" and a factor in favor of release); *United States v. Vargas*, 502 F.Supp.3d 820, 829-30 (S.D.N.Y. 2020) (finding the defendant's rehabilitation, which included no recent disciplinary infractions and completing "a significant number of other educational programs and courses," was extraordinary and compelling combined with other factors); *United States v. Stephenson*, 461 F. Supp. 3d 864, 873 (S.D. Iowa Oct. 13, 2020) (finding the

While his crimes were serious, Client has accepted full responsibility and has already been subjected to harsh punishment for them. The last 26 years have been transformative for him. He has overcome addiction, which was the principal motivating factor for his crimes. "[H]is commitment to change has become his own responsibility, which he has taken very seriously." Ex. E, Progress Report from BOP Counselor . His volunteer work has been rightfully commended by the Volunteer Project, who couldn't "begin to [explain] how touched people were by both the beauty of [his] ornaments but also by the story of where they were made and who made them." *See* Ex. F, Volunteer Project Letter. He has invested in himself, taking numerous courses and practicing his woodworking trade, skills in which he plans to seek employment after release. *See* Ex. G, Education Records. He has mentored others, such as Incarcerated Friend, who volunteers with Client for the Volunteer Project and writes that "Client has been like a second father to me" and that "[a]ll the good I've seen Client do has to count for something." S*ee* Ex. H, Letters of Support. And, as this Court has recognized, "Client has been an exemplary inmate," who has not incurred a single disciplinary incident and who has a Minimum PATTERN score, demonstrating his unlikeliness to reoffend. *United States v.* Client, 2020 WL , at *3 (D. Colo.).

Client also has a strong community support network ready to welcome him home. If released, Client would spend much of his time caring for his wife, , who suffers from Multiple Sclerosis, is wheelchair-bound, and is legally blind. Wife "dream[s] . . . there will be a day [when they] may begin [their] lives together once again." Ex. H. Remarkably, she still has "faith in our justice system to do what is best and right." *Id*. His daughter has offered to

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defendant's "exemplary rehabilitation," which included meeting or exceeding expectations in his work responsibilities and being "'very active' in BOP programming" "cuts in favor of release").

let him live with her and her family at their home in State. She "dream[s] of a day that [her] father may pass on his wisdom and kindness to [her] son," that grandfather and grandson might "build a birdhouse or hook a worm on a fishing line." *Id.* Daughter's husband, similarly hopes to bring Client even more into his family's life and promises "us boys would hog his time." *Id.* Client's youngest grandson would like this Court to know:

> Client is my grandpa . I am seven years old, and I don't know what things to say to tell you how I want my grandpa in my life. I want to play video games with him. I want to show him my room and my toys and do fun things together. Please let my grandpa come home because he is a great guy, and he is my grandpa .

Id.

A reduced sentence of time-served would be "sufficient, but not greater than necessary." § 3553(a). In the words of Mr. AUSA, "Mr. Client has served [over] 25 years in prison for his crime, and has demonstrated significant rehabilitation, his life sentence is now far greater than necessary to achieve the ends of justice in this case. He has done enough time." Ex. A.

2. Client *Is Not a Danger or Risk to the Public*

Client does not pose a danger to any other person or to the community at large. He takes full responsibility for the choices that he made over two decades ago and his character development during his incarceration has been remarkable. He has addressed his substance abuse and has the skills he needs to successfully reintegrate into society upon his release. With structure provided by his roles as husband, father, and grandfather, he will contribute to his community, rather than endanger it. At a time when so many incarcerated individuals have been forsaken by the criminal legal system, we ask this Court to see the potential in Client. He has

worked hard to improve himself and stands prepared to reintegrate into society with his loved ones ready to support him at every step of the way.

CONCLUSION

We respectfully urge the Court to use the power conferred by the First Step Act to reduce Client's sentence and grant this unopposed motion for a sentence reduction to Time Served.

DATED: New York, New York
[redacted]

By: /s/ *John Gleeson*

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Applicant Details

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Contact Phone Number	**3155157018**

Applicant Education

BA/BS From	**University of Rochester**
Date of BA/BS	**May 2019**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 1, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Human Rights Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience **Appellate**

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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May 26, 2023

The Honorable Kiyo Matsumoto
United States District Court
Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am a Staff Attorney at the Second Circuit Court of Appeals and a 2022 graduate of Columbia Law School. I write to apply for a clerkship beginning in October 2025 or any term thereafter. As a lifelong resident of New York, I would be thrilled to continue working in my home state and look forward to establishing my legal career here.

In my current role, I have been exposed to the complexities of federal court practice, and write clear and concise bench memoranda on a broad array of issues for panels of the Second Circuit. This experience has prepared me well for a clerkship and I am confident that with my writing and research skills, in addition to my dedication to public service, I would contribute meaningfully to your chambers.

Enclosed please find a resume, transcript, and writing sample. Also enclosed are letters of recommendation from Professors Philip M. Genty (212 854-3250, pgenty@law.columbia.edu), Susan P. Sturm (212 854-0062, ssturm@law.columbia.edu), and Alexis J. Hoag-Fordjour (718 780-0372, alexis.hoag@brooklaw.edu) all of whom have supervised my work in and out of the classroom.

Thank you for your consideration. Should you need any additional information, please do not hesitate to contact me.

Respectfully,

Amanda Cabal

Amanda Cabal

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Education

Columbia Law School New York, NY
J.D., May 2022
Honors: Harlan Fiske Stone Scholar (for academic achievement)
Lowenstein Fellow (awarded to a CLS graduate who shows exceptional dedication and potential for contribution to public interest law)

Activities: A Jailhouse Lawyer's Manual, Executive Articles Editor
Human Rights Law Review, Staff Editor
Prison Healthcare Initiative, President

University of Rochester Rochester, NY
B.A., *cum laude*, May 2018
Majors: International Relations and History
Take 5 Scholar: (fellowship to study *The Evolution of Modern Poetry*)
Study Abroad: Freiburg, Germany, Fall 2016

Experience

U.S. Court of Appeals for the Second Circuit New York, NY
Staff Attorney August 2022 – Present
Prepare bench memoranda and orders providing legal analysis and recommended dispositions, in both counseled and *pro se* cases, for the judges of the Second Circuit. Subject matter includes: civil rights, criminal law and procedure, constitutional law, *habeas corpus*, securities, appellate jurisdiction, and civil procedure.

Criminal Defense Clinic New York, NY
Student Attorney Spring 2022
Represented individuals facing misdemeanor charges in New York City courts from arraignment through the final disposition. Developed litigation strategies, appeared in court, and provided a holistic defense to clients, including counseling on collateral consequences.

Squire Patton Boggs Public Service Initiative New York, NY
Legal Extern Fall 2021
Assisted indigent clients challenging death sentences and seeking *habeas* relief focusing on constitutional rights.

The Legal Aid Society – Prisoner's Rights Project New York, NY
Legal Intern Summer 2021
Supported attorneys pursuing class actions related to issues of solitary confinement, heat distress, and inadequate mental health treatment on behalf of people in NYC jails. Conducted research and wrote memos on access to personnel records and discrimination under the ADA for potential litigation in both state and federal court.

Paralegal Pathways Initiative New York, NY
Fellowships Coordinator, Summer Research Assistant 2020-2022
Led team of law students working on project for justice-impacted people in New York seeking employment in the legal field. Partnered with legal organizations to create fellowship positions, oversaw placements, and identified funding sources.

Phillips Black New York, NY

Legal Extern 2020-2021
Drafted language for a capital § 2254 *habeas corpus* brief. Focused on removing procedural bars and obtaining relief under *Atkins* in state and federal post-conviction proceedings.

Prisoner's Legal Services of New York Ithaca, NY
Legal Intern Summer 2020
Researched and wrote memoranda on a solitary confinement, excessive use of force, and access to mental health treatment. Reviewed disciplinary hearings, wrote advocacy letters, and drafted administrative appeals.

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CLS TRANSCRIPT (Unofficial)

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Program: Juris Doctor

Amanda P Cabal

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6238-1	Criminal Adjudication	Shechtman, Paul	3.0	A-
L9244-1	Criminal Defense Clinic	Baylor, Amber; Low, Brent	3.0	A-
L9244-2	Criminal Defense Clinic - Project Work	Baylor, Amber; Low, Brent	4.0	A-
L6473-1	Labor Law	Andrias, Kate	4.0	B+
L9160-1	S Paralegal Pathways Initiative Leadership Seminar	Genty, Philip M.; Strauss, Ilene	2.0	CR

Total Registered Points: 16.0

Total Earned Points: 16.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6791-1	Ex. Constitutional Rights in Life and Death Penalty Cases	Irish, Corrine; Kendall, George; Nurse, Jenay	2.0	A-
L6791-2	Ex. Constitutional Rights in Life and Death Penalty Cases - Fieldwork	Irish, Corrine; Kendall, George; Nurse, Jenay	2.0	CR
L6655-2	Human Rights Law Review Editorial Board		1.0	CR
L6359-1	Professional Responsibility in Criminal Law	Cross-Goldenberg, Peggy	3.0	B
L9160-1	S Paralegal Pathways Initiative Leadership Seminar	Genty, Philip M.	2.0	CR
L8293-1	S. Access to Justice: Current Issues and Challenges [Minor Writing Credit - Earned]	Richter, Rosalyn Heather; Sells, Marcia	2.0	A-
L9563-1	S. Mental Health Law	Levy, Robert	2.0	B+

Total Registered Points: 14.0

Total Earned Points: 14.0

Spring 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6241-1	Evidence	Simonson, Jocelyn	3.0	A
L6655-1	Human Rights Law Review		0.0	CR
L6169-2	Legislation and Regulation	Johnson, Olatunde C.A.	4.0	B+
L8520-1	P. Capital Post Conviction Defense Practicum	Hoag, Alexis	2.0	A-
L8520-2	P. Capital Post Conviction Defense Practicum: Experiential Lab	Hoag, Alexis	2.0	CR
L8517-1	Workshop on Facilitating Meaningful Reentry	Genty, Philip M.	2.0	CR

Total Registered Points: 13.0

Total Earned Points: 13.0

Fall 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L8419-1	Abolition: A Social Justice Practicum	Harcourt, Bernard E.; Hoag, Alexis	2.0	A
L8419-2	Abolition: A Social Justice Practicum: Experiential Lab	Harcourt, Bernard E.; Hoag, Alexis	1.0	A-
L6425-1	Federal Courts	Metzger, Gillian	4.0	A-
L6655-1	Human Rights Law Review		0.0	CR
L6474-1	Law of the Political Process	Briffault, Richard	3.0	B+
L6675-1	Major Writing Credit	Genty, Philip M.	0.0	CR
L6695-1	Supervised JD Experiential Study	Genty, Philip M.	1.0	CR
L6683-1	Supervised Research Paper	Genty, Philip M.	1.0	CR

Total Registered Points: 12.0

Total Earned Points: 12.0

Spring 2020

Due to the COVID-19 pandemic, mandatory Credit/Fail grading was in effect for all students for the spring 2020 semester.

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6133-2	Constitutional Law	Barenberg, Mark	4.0	CR
L6108-4	Criminal Law	Harcourt, Bernard E.	3.0	CR
L6679-1	Foundation Year Moot Court	Strauss, Ilene	0.0	CR
L6177-1	Law and Contemporary Society	Moglen, Eben	3.0	CR
L6121-25	Legal Practice Workshop II	Polisi, Caroline Johnston	1.0	CR
L6118-2	Torts	Zipursky, Benjamin	4.0	CR

Total Registered Points: 15.0

Total Earned Points: 15.0